Supreme Court, U.S.
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No. 09-

In the Supreme Court of the United States

FORTIS INSURANCE COMPANY,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The jury in this insurance bad-faith case awarded respondent $150,000 in compensatory damages and $15 million in punitive damages. The South Carolina Supreme Court reduced the latter figure to $10 million, reasoning that such an amount was a constitutionally permissible single-digit multiple of the $1,081,189.40 in "potential harm" that respondent could have suffered. Although respondent had introduced evidence that, over a lifetime, a person with HIV could incur $1,081,189.40 in medical expenses in order to prove that petitioner had a "motive" to rescind his policy, respondent had never contended that this figure (which did not account for deductibles, co-pays, premiums, and exclusions) represented his potential harm, and in fact had never asked the jury to base punitive damages on potential harm at all (instead urging a wealth-based measure). Moreover, the trial court did not instruct the jury that it could consider potential harm, instead instructing that the punitive damages were required to bear a relationship to "the harm caused." The questions presented are:

1. Whether the South Carolina Supreme Court deprived petitioner of procedural due process by justifying the punitive damages on the basis of a ground that was not advanced by respondent at trial and that was foreclosed by the jury instructions.

2. Whether the $10 million punitive award—which is 67 times the compensatory damages, over nine times the measure of potential harm adopted by the court below, and $9,970,000 more than the maximum possible fine for the conduct at issue—is unconstitutionally excessive.

RULE 29.6 STATEMENT

Fortis Insurance Company, n/k/a Time Insurance Company, Inc., is a wholly-owned subsidiary of Interfinancial, Inc., which itself is a wholly-owned subsidiary of Assurant, Inc., a publicly-traded entity. No publicly-traded corporation owns 10% or more of the stock of Assurant, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Fortis Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The decision of the South Carolina Supreme Court (App., *infra*, 1a-28a) has not yet been released for publication. The trial court's order denying the post-trial motions (*id.* at 29a-70a) is unpublished.

JURISDICTION

The South Carolina Supreme Court filed its decision on September 14, 2009 (App., *infra*, 1a), and denied rehearing on December 17, 2009. *Id.* at 71a-72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case arises out of Fortis's erroneous temporary rescission of an individual health insurance policy after receiving a medical record whose date indicated (inaccurately, as it turned out) that the insured, Jerome Mitchell, Jr., had been diagnosed with HIV only two days before he applied for the policy. It was not until after Mitchell filed suit that Fortis learned that the date of the medical record was in error. Fortis then retroactively reinstated the policy and offered to pay all claims that arose during the time that the policy had been rescinded, but Mitchell

continued with his lawsuit. The jury ultimately awarded him $150,000 in compensatory damages and $15 million in punitive damages. The trial court upheld the judgment in full. The South Carolina Supreme Court reduced the punitive damages to $10 million. It reasoned that an exaction of that amount was a constitutionally permissible multiple of the "potential harm" to Mitchell, which it valued at $1,081,189.40—even though Mitchell did not contend at trial that this figure constituted "potential harm," did not ask the jury to base the amount of punitive damages on ***any*** measure of potential harm (instead arguing for a percentage of Fortis's capital surplus), and acquiesced in a jury instruction that specified that the punitive damages must "bear a relationship" to "the harm caused."

The South Carolina Supreme Court's reliance on a consideration that was not urged by the plaintiff and that was not the basis for the jury's verdict adds to confusion in the courts over the procedural safeguards that must be afforded defendants in punitive damages cases. And its application of this Court's three excessiveness guideposts deepens several additional splits. Both the procedural and the substantive aspects of that court's decision warrant review.

A. The Facts Giving Rise To Mitchell's Lawsuit

On May 15, 2001, Mitchell applied for a health insurance policy from Fortis, because he was planning to attend college and his mother's policy no longer covered him. R675, 1891-1896.[1] The policy

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[1] Citations to "R___" refer to the Record on Appeal in the South Carolina Supreme Court.

covered up to 50% of out-of-pocket costs incurred by Mitchell, subject to a $1,000 annual deductible, a separate $500 annual prescription-drug deductible, and various co-payments. R1862, 1872.

Mitchell stated on his application that he had not been "diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession." R1893. Fortis approved the application and issued the policy.

In May 2002, after attempting to donate blood, Mitchell learned that he had tested positive for HIV. R681-682. Mitchell realized that he could not afford the deductibles and co-payments required under the insurance policy he had selected, and his physician advised him to seek free medication from a federally-funded clinic (the "Free Clinic"). R635-636, 686. Mitchell began going to that clinic in July, 2002, and he received free and uninterrupted treatment throughout the period relevant to this lawsuit. R635-636, 700.

In mid-2002, however, Mitchell did submit a small insurance claim relating to his HIV treatment. R1010. In accordance with its standard procedure for addressing claims for long-term disease, Fortis investigated whether Mitchell's illness was an undisclosed pre-existing condition. R1012. The medical records sent to Fortis by Mitchell's physician included a handwritten document, dated May 14, ***2001***, that stated:

> Chief Complaint: Gave blood in March — Got letter yesterday stating blood tested + HIV.

R2396. According to that document, Mitchell had first learned that he was HIV-positive on May 13,

2001—two days before he signed his insurance enrollment form. R1917-1923, 2396-2398.

Based on that record, Fortis concluded that Mitchell had made a material misrepresentation on his application and rescinded the policy. R1925. Fortis notified Mitchell of the rescission by letter dated September 5, 2002, and invited him to submit "any additional information you may have which would effect [*sic*] our decision to rescind your policy." *Ibid.* Although the medical record that Fortis had received from Mitchell's doctor was misdated, Mitchell never told Fortis that.[2]

Not until eight months later, on June 4, 2003, did Mitchell's litigation counsel contact Fortis, alleging bad-faith rescission and breach of contract (R2406-2407) and demanding either $450,000 (plus reinstatement of insurance coverage), or $6 million (without reinstatement). R248, 264-262, 2422-2423. Mitchell's attorneys specified that his demand should not be considered an "appeal" of the rescission, and they also revoked Mitchell's authorization for Fortis to receive his medical records from third parties.

---

[2] The South Carolina Supreme Court stated that Fortis "spurned" the offer of a Free Clinic caseworker to provide documents confirming that Mitchell did not test positive for HIV until after he purchased his policy. App., *infra*, 5a. The "spurn[ing]" in fact consisted of nothing more than accurately informing the caseworker that federal and state law prohibited Fortis from discussing Mitchell's insurance or medical information with third parties without his express written authorization. R644, 708; see 45 C.F.R. §§ 160.101-160.312, 164.102-164.534; S.C. Code § 30-2-20; S.C. Code Regs. 69-58, Art. V § 17(A) (2001). Neither Mitchell nor the caseworker followed up with the necessary authorization, much less proof of the scrivener's error.

R2408, 2412-2414. Finally, although the letter enclosed a copy of the report for a May 14, ***2002*** blood test (*ibid.*), it said nothing to suggest that that was the ***first*** test showing that Mitchell had HIV or to cast doubt on the document bearing the 2001 date.

Despite the insistence by Mitchell's attorneys that he was not appealing the rescission, Fortis's Rescission Committee considered his case again on June 18, 2003. R1950-1960. Still lacking any evidence refuting the conclusion of misrepresentation or casting doubt on the record containing the 2001 date, however, Fortis concluded that it could not reinstate the policy. *Ibid.* It notified Mitchell's lawyers of that decision in writing and invited them to contact it if they had any further questions or concerns. R2020-2030.

Instead, Mitchell filed suit on July 21, 2003. On March 8, 2004, Fortis finally received a corrected medical record in discovery reflecting that the date on the handwritten note was off by a year. R1971-2013. As a result of that new information, Fortis retroactively reinstated Mitchell's health insurance and invited him to submit any claims that accrued while the insurance was temporarily rescinded. R2415-2416. Despite the reinstatement of his insurance, Mitchell continued to receive treatment at the Free Clinic. R635, 660, 686. Mitchell also obtained Blue Cross/Blue Shield health insurance through his employer. R699.

B. Proceedings Below

Mitchell's theory at trial was that Fortis engaged in bad faith by not confirming the accuracy of the medical record on which it based its rescission decision. Mitchell sought compensatory and punitive

damages. In attempting to satisfy South Carolina's standard for punitive damages, Mitchell argued that Fortis had a financial motive for rescinding his policy, namely the money it would save by not having to pay his HIV-related claims.

To support this theory, Mitchell presented testimony from a nurse describing the cost of a generic plan of care for any HIV patient. R771-772. Substantial components of that plan of care addressed health problems that Mitchell himself had never exhibited. R782-783. The nurse's estimate did not account for premiums, co-payments, and deductibles; moreover, some of the largest line items in that estimate were for services that the policy did not even cover, such as psychological treatment. R958 (indicating that "psychological group counseling is the [second] most expensive" component); R1878-1879 (exclusion of mental illness from coverage).

These costs were extrapolated to age 77, the average life expectancy of a male of Mitchell's age. R766. Finally, an economist calculated the present value of the total at $1,081,189.40. R1533.

At trial, Mitchell used this figure for one purpose and one purpose only: to establish bad faith by showing that Fortis had a financial incentive to rescind the policy. He argued during summations that when

> deciding whether Fortis acted willfully in reckless disregard, one of the things that you can also consider, besides all those reasons, is whether Fortis had a ***financial incentive*** to act the way they did.
>
> ... If Fortis's health care management team had done numbers, the minimum care costs they were looking at would have been

> in this range. That's their ***financial incentive.***
>
> ... [Adding in other costs, g]ives you a total of one million eighty-one thousand and one hundred and eighty-nine dollars and forty ***($1,081,189.40)*** cents, the treatment and costs that were facing Fortis Insurance Company at the time that they decided to rescind Jerome's policy.

R1532-1533 (emphasis added). Consistent with that argument, the trial court instructed the jury that it could consider any financial incentive "in determining whether an insurance company acted in bad faith and with willful or reckless disregard for the Plaintiff's rights." R1601.

Mitchell took a totally different tack in arguing about the ***amount*** of punitive damages, urging the jury to award a percentage of either Fortis's investment income or its capital surplus. R1536-1537.

Mitchell never suggested to the jury that it should consider "potential harm" in setting the amount of punitive damages, much less that the $1,081,189.40 figure was an accurate measure of potential harm. Nor did he ask the trial court to instruct the jury that it could consider potential harm. Instead, he acquiesced in an instruction that focused the jury squarely on the actual harm caused by the conduct. That instruction told the jury that, in setting punitive damages,

> You must first consider the relationship between any punitive damage and ***the harm caused***. Any penalty imposed should take into account the reprehensibility of the conduct, ***the harm caused,*** the Defendant's

> awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment; thus, any penalty imposed should bear a relationship to the nature and extent of the conduct and ***the harm caused,*** including the compensatory damage award made by you.

R1606-1607 (emphasis added).

The jury awarded $150,000 in compensatory damages and $15 million in punitive damages on the bad-faith claim, as well as $36,600 for breach of contract. R1632-1633. Because the contract and tort claims were alternative theories of liability, Mitchell elected the tort damages, and the trial court entered judgment for $150,000 in compensatory damages and $15 million in punitive damages. See App., *infra*, 2a.

Fortis filed post-trial motions, arguing, among other things, that the punitive award was unconstitutionally excessive. The trial court upheld the judgment in its entirety, concluding, *inter alia*, that the punitive damages were not disproportionate to the $6 million lifetime maximum payout under the policy, which it regarded to be a reasonable measure of the "potential harm" from the rescission. App., *infra*, 48a-49a. On appeal, the South Carolina Supreme Court reduced the punitive award to $10 million on the ground that it was unconstitutionally excessive under the three guideposts identified in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and refined in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). See App., *infra*, 24a.

Analyzing the five reprehensibility factors identified in *State Farm*, the court first determined that "Fortis's conduct was highly reprehensible and that

the imposition of punitive damages was appropriate." App., *infra*, 20a.

Turning to the ratio guidepost, the court held that the punitive damages should not be compared to the $150,000 award of actual damages, but instead "to the *potential* harm suffered by the plaintiff." App., *infra*, 20a. It nevertheless rejected "the circuit court's assertion that Mitchell suffered $6 million in potential harm" as "unsupported by the evidence and too speculative." *Id.* at 21a. Instead, the court decided that the $1,081,189.40 present value of the nurse-expert's hypothetical treatment plan—which had never before been offered for this purpose—"bears a closer relation to Mitchell's potential risk than the $6 million lifetime payout." *Ibid.* The court then held that the 13.9:1 ratio of the punitive damages to this newly identified measure of potential harm was grossly excessive. *Ibid.*

The court next considered the third guidepost, but did not address the legislatively established civil penalties for insurance bad faith, which it had held in an earlier case to be too small to compare with any "'meaningful punitive damage award.'" See *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006). Instead, it reviewed the punitive-to-compensatory ratios in other cases without regard to the nature of the conduct in those cases or the absolute amount of punitive damages at issue. Noting that "South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from the norm in cases involving particularly egregious conduct," the court concluded that "the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio." App., *infra*, 23a-24a.

It accordingly reduced the punitive award to $10 million, 9.2 times the measure of potential harm it had latched onto.

REASONS FOR GRANTING THE PETITION

The question whether and how the due process clause constrains common-law punitive damages awards is both a recurring and an important one. This Court's recent decisions in this area have helped bring greater procedural fairness and have reduced the frequency of arbitrary, outlier exactions. Nevertheless, there remains a good deal of confusion in the lower courts regarding the proper application of those precedents and, as a result, many outsized exactions continue to escape the net. The present case exemplifies this confusion in several different respects, making it an excellent vehicle for providing the guidance that the lower courts continue to need.

First, in justifying the enormous and disproportionate exaction in this case, the South Carolina Supreme Court relied on a post hoc "potential harm" theory that Fortis had no realistic opportunity to refute at trial and that demonstrably was not the basis for the verdict. The court thereby deprived Fortis of a core element of procedural due process and placed itself in conflict with decisions of other courts that have refused to countenance after-the-fact justifications for punitive damages judgments. Second, the decision below deepens divisions among the lower courts regarding the proper application of each of the three *BMW* guideposts by (i) confining the reprehensibility inquiry to a rote, checklist-like approach to the five reprehensibility factors identified in *State Farm* and failing to compare the conduct in this case to other conduct for which comparable amounts of punitive damages have been permitted; (ii) ignoring

this Court's admonition that, when the compensatory damages are "substantial," a 1:1 ratio may mark "the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 410, 425); and (iii) refusing to compare the punitive damages to the legislatively established fine for comparable conduct on the ground that the fine is "too low." In short, this case presents the Court with an opportunity to clarify multiple aspects of its punitive-damages jurisprudence in a single stroke.

I. The South Carolina Supreme Court's Employment Of A Post Hoc Rationale For The Punitive Award Warrants Review And Reversal.

This Court has indicated that perhaps the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to ***the actual harm*** inflicted on the plaintiff." *BMW*, 517 U.S. at 580 (emphasis added); see also *State Farm*, 538 U.S. at 426 ("courts must ensure that the measure of punishment is both reasonable and proportionate to ***the amount of harm to the plaintiff*** and to ***the general damages recovered***") (emphasis added); *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2629 (2008) ("the ratio between compensatory and punitive damages is ... a central feature in our due process analysis"). Indeed, in setting the common-law limit on punitive damages in maritime cases, the Court placed near-exclusive emphasis on the ratio of punitive to compensatory damages. See *Exxon Shipping, supra*. In addition to being a practice of long standing, comparing punitive damages to compensatory damages has the virtue of simplicity because both figures are almost always readily discernible from the verdict form.

Nevertheless, in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), a three-Justice plurality opined that in some cases "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded." *Id.* at 460. The plurality proceeded to conclude that the $10 million punitive award in that case was not sufficiently disproportionate to the potential harm (which the plurality indicated could have ranged from $1 million to $8.3 million) to be indicative of unconstitutionality. *Id.* at 462.

Significantly, four of the remaining six Justices rejected the plurality's reliance on potential harm in that case because that theory had not been argued at trial. In a dissenting opinion joined by two other Members of the Court, Justice O'Connor explained that she had no quarrel with the plurality that, "in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim," but observed that in the case before the Court "[t]he record demonstrates that the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal." *Id.* at 484-485 (O'Connor, J., dissenting). Specifically, the potential harm figures were based on post hoc extrapolations from evidence offered for other purposes; the jury was never instructed that it could consider potential harm; and respondent never suggested to the jury that it set punitive damages based on potential harm, focusing instead "on TXO's vast wealth." *Id.* at 485-487 (O'Connor, J., dissenting). In his concurring opinion, Justice Kennedy agreed that "the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct" and that the po-

tential harm theory therefore did not "provide[] a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational." *Id.* at 468 (Kennedy, J., concurring).[3]

Since *TXO*, the lower courts have been deeply confused about when potential harm may be used to justify an otherwise disproportionate punitive award. Agreeing with Justices O'Connor and Kennedy, some courts have refused to consider potential harm in the analysis because that rationale was not placed before the jury.[4] By contrast, like the *TXO* plurality, other courts have invoked potential harm even when the plaintiff did not invoke that rationale at trial and the jury was not instructed to consider it.[5]

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[3] Justices Scalia and Thomas had no reason to involve themselves in this dispute because they concurred in the judgment on the ground that the Due Process Clause places no limits on the amount of punitive damages. *TXO*, 509 U.S. at 470-472 (Scalia, J., dissenting).

[4] See, *e.g.*, *Sec. Title Agency, Inc.* v. *Pope*, 200 P.3d 977, 1000 (Ariz. Ct. App. 2008) (rejecting plaintiff's contention that five-year lost-profits projection introduced to support claim for compensatory damages and evidently rejected by the jury could be used, after-the-fact, as a measure of the potential harm from the misconduct); *Goddard* v. *Farmers Ins. Co.*, 179 P.3d 645, 666 (Or. 2008) (en banc) (refusing to credit argument in insurance bad-faith case that potential harm to the insured included an amount that could have been, but was not awarded, against the insured in the underlying personal injury case because "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury" in the case in which punitive damages are awarded).

[5] See, *e.g.*, *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1350 (Fed. Cir. 2001) (noting that "competent evidence of damages may have existed, but was never introduced" and reinstating punitive award that was 38,000 times the compensatory damages based

This case is an ideal vehicle for resolving the confusion in the lower courts because there can be no serious question that the South Carolina Supreme Court's reliance on the ratio between the punitive damages and the $1,081,189.40 figure was a post hoc rationale of which Fortis lacked any meaningful notice. Specifically, (i) Mitchell at no point so much as hinted that the $1,081,189.40 figure was relevant to anything other than Fortis's motive; (ii) Mitchell did not seek an instruction informing the jury that it could consider potential harm (however measured) in setting the amount of punitive damages; (iii) the trial court never instructed the jury that it could consider potential harm in setting the punitive damages and instead told the jury that the punitive damages had to "bear a relationship to ... the harm caused, including the compensatory damage award made by you" (R1606-1607); (iv) Mitchell urged the jury to base the punitive damages on a percentage of Fortis's wealth; and (v) the verdict was 5% of Fortis's surplus—one of the very measures suggested by Mitchell—rounded

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on "a strong suggestion in the record that the potential compensatory damages may have been much higher than what was actually awarded"); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 384 (La. Ct. App. 2001) (construing *TXO* to permit post hoc reliance on potential harm "*despite the fact that there was no jury determination of the amount of such potential harm*"); *Bennett* v. *Reynolds*, 242 S.W.3d 866, 905 & n.46 (Tex. Ct. App. 2007, pet. granted) (acknowledging that jury never found potential harm, but nonetheless justifying punitive awards that were 188 and 47 times the compensatory damages on the ground that plaintiff could have suffered emotional distress and reputational harm, which the court valued at $500,000 based on one defendant's testimony that *he* would accept $500,000 for *his* emotional distress).

to the nearest million dollars.[6] Accordingly, this case well frames the question whether upholding a punitive award in reliance on a theory of "potential harm" that was not presented to the jury and was not the basis for its verdict violates procedural due process.

There also should be little doubt that the answer to that question is "yes." The avoidance of surprise has long been recognized as an important component of due process. See, *e.g.*, *Burns* v. *United States*, 501 U.S. 129, 138 (1991) (noting "serious question whether notice in this setting [upward departures from Sentencing Guidelines] is mandated by the Due Process Clause"). Mere notice of the proceedings is insufficient. "In a variety of contexts, [this Court's] cases have repeatedly emphasized the importance of giving the parties sufficient notice ***to enable them to identify the issues on which a decision may turn.***" *Lankford* v. *Idaho*, 500 U.S. 110, 126 n.22 (1991) (emphasis added); see also *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."); *NLRB.* v. *Air Assocs., Inc.*, 121 F.2d 586, 591 (2d Cir. 1941) ("the test of a fair hearing is whether the issues were clearly defined, so that respondent could address itself to the charges made against it"). Indeed, the right to present "every available defense" (*Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted)) is mea-

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[6] It also was precisely 100 times the tort damages—again, a measure wholly unrelated to the $1,081,189.40 figure.

ningless without fair notice of the theory on which an award of punitive damages is to be justified.

The present case is remarkably similar to *Lankford*, in which this Court held that a trial court violated a defendant's right to due process by imposing the death sentence without giving the defendant any inkling that such a sentence was under consideration.[7] In *Lankford*, the defendant was convicted of first-degree murder. After the guilt phase, the trial court instructed the prosecution to notify the court and the defendant whether it intended to seek the death penalty and, if so, to identify the aggravating circumstances on which it intended to rely. The prosecution responded that it did not intend to seek the death penalty. Thereafter, the penalty hearing took place without any mention of the death penalty by either the prosecution or the court. The court nevertheless sentenced the defendant to death.

This Court reversed, explaining that "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford*, 500 U.S. at 126. The Court rejected the State's argument that "the terms of the statute, plus the advice received at [the defendant's] arraignment, provided such notice" (*id.* at 119), noting that, in view of the prosecution's statement that it was not seeking the death penalty, "it was surely reasonable for the defense to assume that there was no reason to present argument or evidence directed at the question whether the death penalty was either appropri-

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[7] Although *Lankford* was a criminal case, this Court relied on it in *BMW*, noting that "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*." 517 U.S. at 574 n.22 (citation omitted).

ate or permissible." *Id.* at 120. Accordingly, the defendant's "lack of adequate notice that the judge was contemplating the imposition of the death penalty created an impermissible risk that the adversary process may have malfunctioned." *Id.* at 127.

In the present case, the trial court's instructions, which focused exclusively on actual injury, combined with Mitchell's exclusive reliance on wealth-based measures of punishment in his closing arguments, were the functional equivalent of the prosecution's statement in *Lankford* that it did not intend to seek the death penalty. Just as the defendant in *Lankford* had "no reason to present argument or evidence directed at the question whether the death penalty was either appropriate or permissible" (*id.* at 120; see also *id.* at 122), so too Fortis had "no reason" to devote scarce trial time (and juror patience) to show why the $1,081,189.40 figure was a wholly invalid measure of potential harm.[8] Accordingly, just as in *Lankford*, "lack of notice" that the South Carolina Supreme Court would invoke the $1,081,189.40 figure post hoc to justify the punitive award "created an impermissible risk that the adversary process may have malfunctioned." *Id.* at 127; see also *In re Ruffalo*, 390 U.S. 544, 551-552 (1968) ("[Proceedings] become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. ... This absence of fair notice as to the reach of the grievance procedure and the precise na-

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[8] Among other things, the nurse's estimate (i) was based on the unrealistic assumption that Mitchell would live to age 77, (ii) included expensive services (like psychological counseling) that were not covered by Mitchell's policy (see p. 6, *supra*), and (iii) failed to back out the deductibles, co-pays, and premiums that Mitchell is obligated to pay.

ture of the charges deprived petitioner of procedural due process.").

The efforts this Court has made to ensure that punitive damages are adequately constrained will be thwarted if resistant reviewing courts are afforded *carte blanche* to uphold large exactions on the basis of factors never considered, much less relied on, by the jury—especially such malleable ones as "potential harm." To prevent this practice from adding "a near standardless dimension to the punitive damages equation" (*Philip Morris*, 549 U.S. at 347), the Court should grant certiorari and roundly condemn the use of post hoc rationalizations to justify large punitive damages awards.

II. The South Carolina Supreme Court's Application Of The *BMW* Guideposts Warrants Review And Reversal.

Quite apart from the South Carolina Supreme Court's troubling treatment of potential harm, that court's application of the three *BMW* guideposts is illustrative of the conceptual confusion that continues to plague the lower courts, making this case an ideal vehicle for this Court to provide the clarification and guidance that the lower courts sorely need.

Over the past two decades, this Court repeatedly has expressed concern about awards of punitive damages that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris*, 549 U.S. at 355. To assist courts in determining when a punitive award is unconstitutionally excessive, the Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio between the punitive and compensatory damages (or, in appropriate circumstances, potential

harm); and (iii) the difference between the punitive damages and the legislatively-established penalties for comparable misconduct. *BMW*, 517 U.S. at 574-585.

Regrettably, lower courts often apply the *BMW* guideposts mechanically without considering this Court's broader concerns about the "extraordinary" size of punitive awards "by historical standards" (*BMW*, 517 U.S. at 594 (Breyer, J., concurring)) and their "stark unpredictability" (*Exxon Shipping*, 128 S. Ct. at 2625). Moreover, courts routinely misapply the guideposts, weakening their "constraining power to protect against serious and capricious deprivations [of property]." *BMW*, 517 U.S. at 590 (Breyer, J., concurring).

This case is emblematic. The South Carolina Supreme Court applied the three guideposts in robotic fashion, demonstrating no sensitivity to their intended purpose, much less the ultimate inquiry of whether a $10 million exaction is "greater than reasonably necessary to punish and deter" the conduct at issue. *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). Along the way, it made fundamental errors with regard to each guidepost. For example, with respect to the reprehensibility guidepost, it treated the five factors identified in *State Farm* as exclusive, binary considerations and, after concluding (erroneously) that most were present, labeled the conduct "highly reprehensible," and moved on to the next guidepost. Critically absent was any acknowledgment that ***all*** punishable conduct is reprehensible to some degree or any effort to place Fortis's conduct on a spectrum of reprehensibility by comparing it to other kinds of conduct that have warranted penalties in the $10 million range. With regard to the

ratio guidepost, the South Carolina Supreme Court misread this Court's cases by ignoring the Court's admonition that a 1:1 ratio of punitive damages to actual or potential harm may be the constitutional maximum when compensatory damages are "substantial," and instead assuming that any ratio below 10:1 will generally satisfy this guidepost. Finally, the South Carolina Supreme Court effectively nullified the third guidepost by refusing to compare the punitive damages to the legislatively established fine for insurance bad faith and instead simply canvassing the ratios of punitive to compensatory damages in prior South Carolina cases.

Each of the South Carolina Supreme Court's conceptual errors is illustrative of a more pervasive confusion. Indeed, the lower courts are deeply divided as to all three points, reflecting the "arbitrariness" (*Philip Morris*, 549 U.S. at 355), "stark unpredictability" (*Exxon Shipping*, 128 S. Ct. at 2625), and "unfairness" (*id.* at 2627) about which this Court has expressed concern. This Court's review is urgently needed to bring the necessary fairness and predictability to the process.

A. Reprehensibility

The purpose of the reprehensibility guidepost is to ensure that the amount of punitive damages is not out of proportion to "'the enormity of [the] offense'" (*BMW*, 517 U.S. at 575)—or, as Justice Breyer has put it, to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*id.* at 590 (Breyer, J., concurring)). To assist courts in making this determination, this Court has identified five, nonexclusive factors: (i) whether the harm was physical or merely economic; (ii) whether the conduct involved

a reckless disregard for health or safety; (iii) whether the target of the conduct was economically vulnerable; (iv) whether the defendant's conduct was part of a broader pattern or instead was an isolated incident; and (v) whether the conduct entailed "intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. That effort at providing guidance has, however, caused many courts to lose sight of the forest for the trees. Rather, than using these factors as a means of locating the conduct on a spectrum of reprehensibility and assessing whether the conduct was bad enough to justify the amount of punishment imposed, courts have treated them as a checklist and assumed that the more boxes that can be checked, the higher the permissible ratio of punitive to compensatory damages.[9]

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[9] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-840 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-1371 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Fastenal Co.* v. *Crawford*, 609 F. Supp. 2d 650, 669 (E.D. Ky. 2009); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-970 (N.D. Iowa 2006); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at *29-*31 (W.D. Pa. Jan. 3, 2006); *Sanchez* v. *Brokop*, 398 F. Supp. 2d 1177, 1194 (D.N.M. 2005); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-361 (Ark. 2003); *Superior Fed. Bank.* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006); *Century Sur. Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-499 (Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d at 742, 747-748 (Ga. Ct. App. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-447 (Kan. 2006); *Vasquez-Lopez* v. *Beneficial*

Relatedly, in their rigid adherence to the five factors, many courts have either expressly or implicitly rejected the notion that a meaningful assessment of reprehensibility entails comparing the conduct at issue to that in other cases in which significant amounts of punitive damages have been imposed.[10] By contrast, a number of courts have rejected this blinkered approach, recognizing that the goal of avoiding arbitrariness requires ensuring that conduct of similar reprehensibility draws similar punishment, while conduct of differing reprehensibility is punished differently.[11]

Or., Inc., 152 P.3d 940, 959 (Or. Ct. App. 2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-604 (Tex. Ct. App. 2005); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App. 2005), rev'd on other grounds sub nom. *Coastal Oil & Gas Corp* v. *Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-419 (Tex. Ct. App. 2003), rev'd per curium on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-417 (Utah 2004).

[10] See, *e.g.*, *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1320 (11th Cir. 2007); *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007).

[11] See, *e.g.*, *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 54, 55-56 (1st Cir. 2009) ("Although the Mayor's conduct was reprehensible, it was not 'particularly egregious' in comparison to defendants' conduct in other cases supporting substantial punitive awards."); *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 875 (8th Cir. 2008) ("the reprehensibility of its conduct was comparable to the conduct which supported punitive damages in prior business cases"); *Saunders* v. *Branch Banking & Trust Co.*, 526 F.3d 142, 154 (4th Cir. 2008) ("Examining [other] punitive damages awards for violations of FCRA, we cannot conclude that an award of $80,000 is grossly excessive or arbitrary."); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005) (misconduct in connection with the performance of "a socially valuable task" is less reprehensi-

The decision below is illustrative of this conceptual confusion. The South Carolina Supreme Court marched through the five *State Farm* factors, concluded that four were present (and that the absence of the fifth didn't matter), and then jumped to the conclusion that "Fortis's conduct was highly reprehensible." App., *infra*, 20a.[12] Even if, in hindsight,

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ble than conduct serving no legitimate purpose, such as "intentional, repeated ethnic harassment"); *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming $1.25 million punitive award for breach of fiduciary duty because the misconduct, "according to the hierarchy of reprehensiveness, was clearly more reprehensible than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*"); *Roby* v. *McKesson Corp.*, 219 P.3d 749, 797 (Cal. 2009) ("McKesson's conduct, although wrongful, does not rise to the kind of oppressive, fraudulent, or malicious conduct that has in the past justified large punitive damages awards."); *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (reducing punitive award from $1.7 million to $50,000 in part because the fraud at issue was "of relatively low culpability" compared to "the universe of cases warranting punitive damages under California law"); *McDonald's Corp.* v. *Ogborn*, 2009 WL 3877533, at *21 (Ky. Ct. App. Nov. 20, 2009) ("The $1,000,000 punitive damages award is extraordinary when compared to other stand-alone IIED cases."); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 140, 143 (Ohio 2002) (comparing reprehensibility and dollar awards from other cases).

[12] In holding that the repeated misconduct factor was present merely because Fortis initially upheld its rescission decision during an internal review, the South Carolina Supreme Court contributed to a deep split over the meaning of this factor. See *Sec. Title Agency*, 200 P.3d at 1000 n.23 ("We also note that jurisdictions differ as to whether 'repeated actions' for this purpose may consist solely of acts against the plaintiff or whether the plaintiff must show that the defendant has committed outrageous acts against another."). Like the South Carolina Supreme Court, some lower courts have declared this factor to be present after atomizing the conduct that injured the plaintiff.

Fortis's reliance on the misdated medical record, like the conduct of State Farm toward the Campbells, "merits no praise" (*State Farm*, 538 U.S. at 419), the South Carolina Supreme Court never asked the key question whether that conduct warrants a $10 million penalty and seemed entirely untroubled by the

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See, *e.g.*, *CGB Occupational Therapy, Inc.* v. *RHA Health Servs., Inc.*, 499 F.3d 184, 191 (3d Cir. 2007) ("while the 'repeated conduct' subfactor will necessarily have 'less force' where the defendant's misconduct did not extend beyond his dealings with the plaintiff, it may still be 'relevant' in measuring the reprehensibility of the defendant's conduct") (quoting *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232-233) (3d Cir. 2005); *Trinity Evangelical Lutheran Church & Sch.-Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 801 (Wis. 2003) ("Gallagher, as the representative of Tower, made a series of decisions that illustrate bad faith on behalf of Tower."). By contrast, numerous other courts have held that "[t]he repeated conduct factor 'require[s] that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff.'" *Chicago Title Ins. Corp.* v. *Magnuson*, 487 F.3d 985, 1000 (6th Cir. 2007) (quoting *Bach* v. *First Union Nat'l Bank*, 149 F. App'x 354, 365 (6th Cir. 2005)). See *Fastenal Co.* v. *Crawford*, 609 F. Supp. 2d 650, 670 (E.D. Ky. 2009) ("this behavior by the ... Defendants does not constitute similar reprehensible conduct committed against different parties and thus this factor does not weigh in favor of a punitive damage award"); *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Ct. App. 2007) (finding that insurer's "persistent denial of a defense" failed to satisfy the "repeated actions" prong because "[t]here was one denial of the tender of a defense" and "'persistent' is not the same as a repetition of the decision in other instances"); *Simon*, 113 P.3d at 76 (factor requires that defendant "had acted similarly toward other potential buyers"); *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13 (Guam Nov. 16, 2004) (this factor was not implicated even though defendant's wrongful acts "spanned several years" and injured plaintiff on separate occasions because those acts comprised a single course of conduct).

fact that the highest amount of punitive damages ever before sustained in an insurance bad-faith case in South Carolina was only $1.5 million (*Cock-N-Bull Steak House, Inc.* v. *Generali Ins. Co.*, 466 S.E.2d 727, 729 (S.C. 1996)), and that a $10 million exaction dwarfs the punishments authorized in other cases in which the conduct was materially more reprehensible.[13] That cavalier approach to the reprehensibility guidepost cannot be reconciled with this Court's concerns about "the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another" (*Exxon Shipping*, 128 S. Ct. at 2627) and, more particularly, about "the uniform general treatment of similarly si-

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[13] See, *e.g.*, *Planned Parenthood of Columbia/Willamette Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005) (reducing punitive awards totaling $109 million to just over $4.7 million in case in which anti-abortion activists put up "WANTED" posters threatening doctors who provided abortions, creating a threat so serious that that the FBI "warned [the] physicians to purchase bullet proof vests"); *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-603 (8th Cir. 2005) (reducing $15 million punitive award to $5 million where defendant "actively misled consumers about the health risks associated with smoking" leading the decedent's "painful, lingering death following extensive surgery"); *Kemp* v. *AT&T Co.*, 393 F.3d 1354, 1363, 1365 (11th Cir. 2004) (reducing $1 million punitive award to $250,000 where defendant was found to have participated in a "large-scale corporate" effort "to exploit customers who were un-sophisticated and economically vulnerable" by misleadingly presenting gambling debts as "legitimate" long-distance phone charges); *Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 526-529 (Ala. 1997) (reducing punitive damages from $15 million to $3 million where defendant engaged in pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

tuated persons that is the essence of law itself" (*Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (internal quotation marks omitted)).

B. Ratio

In *State Farm*, this Court explained that "[w]hen compensatory damages are substantial, then a lesser ratio, ***perhaps only equal to compensatory damages***, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added); see also *Exxon Shipping*, 128 S. Ct. at 2626, 2634. Heeding this guidance, many courts have reduced punitive awards to amounts at or near compensatory damages when the latter were "substantial."[14] However, many other courts flatly ignore

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[14] See, *e.g.*, *Noyes* v. *Kelly Servs., Inc.*, 2009 WL 3358564, at *1 (9th Cir. Oct. 20, 2009); *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 442-443 (6th Cir. 2009); *Mendez-Matos*, 557 F.3d at 55; *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 27-28 (3d Cir. 2008); *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 490 (6th Cir. 2007); *Bach*, 486 F.3d at 156; *Boerner*, 394 F.3d at 603; *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004); *Cummings Inc.* v. *BP Prods. N. Am., Inc.*, 648 F. Supp. 2d 969, 987 (M.D. Tenn. 2009); *Farm Bureau Life Ins. Co.* v. *Am. Nat'l Ins. Co.*, 2009 WL 361267, at *9-*11 (D. Utah Feb. 11, 2009); *Paul* v. *Asbury Auto. Group, LLC*, 2009 WL 188592, at *11 (D. Or. Jan. 23, 2009); *Martinez* v. *Thompson*, 2008 WL 5157395, at *10 (N.D.N.Y. Dec. 8, 2008); *Adidas Am., Inc.* v. *Payless Shoesource, Inc.*, 2008 WL 4279812, at *15-*16 (D. Or. Sept. 12, 2008); *Zakre* v. *Norddeutsche Landesbank Gironzentrale*, 541 F. Supp. 2d 555, 563-567 (S.D.N.Y. 2008); *Thomas* v. *iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007); *Slip-N-Slide Records, Inc.* v. *TVT Records, LLC*, 2007 WL 3232274, at *30 (S.D. Fla. Oct. 31, 2007); *Kent* v. *United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 957-960 (D.S.D. 2006), aff'd in part, rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007); *Casumpang* v. *Int'l Longshore &*

State Farm's warning that a 1:1 ratio will often be the constitutional maximum and instead assume that any single-digit ratio is presumptively valid.[15]

The current case deepens this conflict. The court below effectively ignored the guidance provided by

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Warehouse Union, 411 F. Supp. 2d 1201, 1219-21 (D. Hawaii 2005); *Watson* v. *E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005), aff'd, 225 F. App'x 3 (2d Cir. 2006); *Hudgins* v. *Sw. Airlines Co.*, 212 P.3d 810, 829-830 (Ariz. Ct. App. 2009); *Sec. Title Agency*, 200 P.3d at 1001; *Roby*, 219 P.3d at 798-799; *Walker*, 63 Cal. Rptr. 3d at 512-514; *Stevens* v. *Vons Cos.*, 2009 WL 117902, at *14 (Cal. Ct. App. Jan. 20, 2009), cert. denied, 130 S. Ct. 204 (2009); *Jet Source Charter, Inc.* v. *Doherty*, 55 Cal. Rptr. 3d 176, 181-184 (Ct. App. 2007); *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004); *Maskantz* v. *Hayes*, 832 N.Y.S.2d 566, 570 (App. Div. 2007); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003).

[15] See, *e.g.*, *Myers* v. *Central Fla. Invs., Inc.*, 2010 WL 20987, at *17 (11th Cir. Jan. 6, 2010); *Wallace* v. *DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009); *Craig Outdoor Adver., Inc.* v. *Viacom Outdoor, Inc.*, 528 F.3d 1001, 1020-1021 & n.9 (8th Cir. 2008), cert. denied, 129 S. Ct. 1000 (2009); *Action Marine*, 481 F.3d at 1321; *Cambio Health Solutions, LLC* v. *Reardon*, 234 F. App'x 331, 339 (6th Cir. 2007); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. 2004); *Rhone-Poulenc Agro*, 345 F.3d at 1372; *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003); *Bogle*, 332 F.3d at 1362; *Union Pac. R.R.*, 149 S.W.3d at 348; *Advocat Inc.*, 111 S.W.3d at 361; *Leeper-Johnson* v. *Prudential Ins. Co. of Am.*, 2009 WL 1318692, at *22-*23 (Cal. Ct. App. May 13, 2009); *Lopez* v. *Bimbo Bakeries USA, Inc.*, 2009 WL 1090375, at *17 (Cal. Ct. App. Apr. 23, 2009); *Century Sur. Co.*, 43 Cal. Rptr. 3d at 500; *McDonald's*, 2009 WL 3877533, at *20-*21; *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007); *Wieber* v. *FedEx Ground Package Sys., Inc.*, 220 P.3d 68, 86 (Or. Ct. App. 2009); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App. 2003), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418.

this Court in *State Farm* (and reinforced in *Exxon Shipping*), concluding that the full range of single-digit ratios is available in virtually all cases, notwithstanding its determination that the compensatory damages were "fairly substantial." App., *infra*, 22a. This case is thus a good one in which to lay down further guidance on this important safeguard against arbitrary punishments.

C. Legislatively established penalties for comparable conduct

The third *BMW* guidepost requires reviewing courts to "[c]ompare[] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. The lower courts are all over the map in applying this guidepost. *See Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) ("the Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in doing so").[16]

Most importantly for present purposes, there is a clear split as to whether the third guidepost is relevant when the legislatively established fines for the pertinent conduct are low. Notwithstanding this Court's invocation of low fines when applying the

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[16] See also *Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521, 540 (Tenn. 2008) ("We are unfortunately left with little guidance as to how to resolve this discrepancy because both *Gore* and *[State Farm]* are cases in which all of the guideposts suggest the same result. Other courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether."), cert. denied, 129 S. Ct. 2433 (2009).

third guidepost in *BMW* and *State Farm* (see *BMW*, 517 U.S. at 584 ($2,000); *State Farm*, 538 U.S. at 428 ($10,000)), a surprising number of courts have refused to treat the existence of a low fine as an indication that a high punitive award is excessive.[17] These

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[17] See, *e.g.*, *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-1233 (10th Cir. 2000) (affirming $58.5 million punitive award that exceeded maximum possible civil penalty by $56 million and explaining that statutory *maximum* punitive damages ratio of 1:1 gave defendant adequate notice of extent to which it could be punished), aff'd, 532 U.S. 588 (2001); *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (affirming $4.35 million award because potential for $10,000 fine "provided fair notice to CE that it might be subject to a substantial penalty"); *Willow Inn*, 399 F.3d at 237-238 (disregarding disparity between $135,000 punitive award and maximum comparable penalty of $10,000 because the court was "reluctant to overturn the punitive damages award on this basis [of the third guidepost]"); *Kemp*, 393 F.3d at 1364 (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *BMW of N. Am., Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997) (per curiam) ("Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award"); *Aken* v. *Plains Elec. Generation & Transmission Co-op.*, 49 P.3d 662, 672 (N.M. 2002) ("As the Supreme Court of Alabama noted in *BMW* on remand, when statutory penalties for the conduct in question are low or do not exist, 'a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.'") (quoting *BMW*, 701 So. 2d at 514); *Flax*, 272 S.W.3d at 540 (approving $13.3 million award because "we do not believe that a punitive damage award [equal to maximum civil penalty] of $125,000 would adequately punish DCC or deter future instances of similar conduct"); *Campbell*, 98 P.3d at 419 (holding on remand that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a

courts are in square conflict with several others that have faithfully applied the third guidepost and concluded that the modest size of legislatively established penalties dictates a finding of excessiveness.[18]

The decision below adds to this split. Section 38-2-10 of the South Carolina Code sets maximum penalties for bad-faith insurance conduct of either $15,000 or, if the conduct was willful, $30,000. But because it had already held in an earlier case that, when penalties for comparable conduct "are set at

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legislature can be quixotic"); see also *In re Exxon Valdez*, 490 F.3d 1066, 1094 (9th Cir. 2007) ("In several recent decisions we have not discussed the factor at all. This may be because legislative judgments, unlike jury verdicts, do not represent an individualized assessment of reprehensibility.") (citations omitted), vacated on other grounds, 128 S. Ct. 2605 (2008).

[18] See, *e.g.*, *Jurinko*, 305 F. App'x at 29-30 ("[T]he large punitive damages award appears excessive in light of the comparatively modest monetary sanctions imposed for such conduct. Section 1171 is unlikely to provide an insurer with fair notice of a $6.25 million award. Although the outrageous conduct that occurred here is unlikely to be deterred by the statutory penalties in § 1171, the third guidepost suggests the award was excessive."); *Bridgeport Music*, 507 F.3d at 490 (third guidepost indicated excessiveness because punitive award was much larger than "the *maximum* allowable" amount of statutory damages under the Copyright Act, which "would be the largest award that a victim of copyright infringement could receive irrespective of the reprehensibility of an infringer's conduct"); *Chasan* v. *Farmers Group, Inc.*, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009) (comparing $370,000 punitive award in insurance bad-faith action to range of fines permissible for unfair insurance claims practices ($5,000 to $50,000), and reducing punitive award to $40,000); *Roby*, 219 P.3d at 798 ($150,000 civil penalty "[o]bviously ... weighs in favor of a lower constitutional limit in this case"); *Major* v. *W. Home Ins. Co.*, 87 Cal. Rptr. 3d 556, 580 (Ct. App. 2009) (concluding that $10,000 civil penalty "supports a relatively low punitive damages award").

such a low level, there is little basis for comparing it with any meaningful punitive damage award" (*James*, 638 S.E.2d at 672 (internal quotation marks omitted)), the South Carolina Supreme Court disregarded those penalties entirely. Instead, it looked to the ratios of punitive to compensatory damages in prior South Carolina cases, thereby effectively duplicating the second-guidepost analysis, and rendering the third guidepost a nullity. App., *infra*, 22a-24a.

In short, in no small part because courts have misunderstood and misapplied the three *BMW* guideposts, "the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted)) remains to be achieved. Because this case is an excellent vehicle for providing the lower courts with the guidance they need, and because there can be little doubt that the court below made critical errors with respect to each of the guideposts, the Court should grant certiorari and reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2010

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APPENDIX A
[Opinion of the Supreme Court of South Carolina (September 14, 2009)]

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Jerome Mitchell, Jr., Respondent,

v.

Fortis Insurance Company, Appellant.

Appeal from Florence County

Michael G. Nettles, Circuit Court Judge

Opinion No. 26718

Heard January 22, 2009 – Filed September 14, 2009

AFFIRMED IN PART; REVERSED IN PART

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia; J. Boone Aiken, III, and James M. Saleeby, Jr., of Aiken, Bridges, Nunn, Elliott & Tyler, both of Florence; Stephan I. Voudris, of Jorden Burt, of Miami, FL; and Franklin G. Burt, of Jorden Burt, of Washington, DC, for Appellant.

Edward L. Graham, Brian D. Phelan, and Sallie P. Phelan, all of Graham Phelan Law Offices, of Florence, for Respondent.

Elizabeth Van Doren Gray and Tina Cundari, both of Sowell, Gray, Stepp & Laffitte, of Columbia; Gray T. Culbreath, of Collins & Lacy, of Columbia; David T. McDowell and Alana K. Pulaski, both of Bracewell & Guiliani, of Houston, TX; for Amicus Curiae.

CHIEF JUSTICE TOAL: In this case, a policyholder brought causes of action for breach of contract and bad faith rescission against his insurance company, and sought actual and punitive damages for the company's termination of his health care insurance from original issuance on the grounds of a purported misrepresentation. The jury awarded the policyholder $36,000 in actual damages on the breach of contract claim, $150,000 in actual damages on the bad faith rescission claim, and $15 million in punitive damages deriving from the bad faith cause of action. This appeal followed.

FACTUAL BACKGROUND

On May 15, 2001, Respondent Jerome Mitchell, Jr. ("Mitchell"), of Florence, submitted an application for health insurance to Appellant Fortis Insurance Company ("Fortis"). Mitchell, who was seventeen years old at the time, was preparing to attend college and was no longer covered under his mother's health insurance policy. The application required him to answer a medical questionnaire, which included the question: "Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" Mitchell answered "no" to this question. Fortis issued Mitchell a health insurance policy.

In April 2002, Mitchell attempted to donate blood to the Red Cross. On May 13, 2002, the Red Cross contacted Mitchell to inform him that his blood had screened positive for HIV. The Red Cross suggested Mitchell get a confirmation test from his personal physician, and Mitchell immediately contacted Dr. Michael Chandler. On May 14, 2002, Dr. Chandler's tests confirmed that Mitchell was HIV positive. That day, one of Dr. Chandler's assistants noted on Mitchell's intake chart: "Gave blood in March – got letter yesterday stating blood tested [positive for] HIV." The handwritten chart note identified Mitchell correctly as eighteen years old, but was erroneously dated May 14, 2001.

Dr. Chandler referred Mitchell to Dr. Kevin Shea, an infectious disease specialist with Carolina Health Care ("Carolina"). On May 23, 2002, Dr. Shea met with Mitchell and recorded Mitchell's medical history as follows:

> Mr. Mitchell is an 18 year old African-American male with no past medical history who apparently tried to donate blood in April of this year. He was noted to be HIV positive. Subsequent confirmation through Dr. Chandler's office included a positive ELISA and Western Blot. He is referred at this time for further evaluation.

Fortis soon received claims for Mitchell's treatment and for the blood testing that indicated Mitchell was HIV positive. Pursuant to company policy in cases involving long-term disease, Fortis launched an investigation to determine whether Mitchell had failed to disclose a pre-existing condition on his policy application.

In June 2002, a Fortis investigator contacted Mitchell to request that he identify his healthcare providers and authorize a medical records release. Mitchell did so, and Fortis contacted Carolina and Dr. Shea to obtain Mitchell's medical records and billing information. Carolina sent Fortis copies of Dr. Chandler's records, Dr. Shea's records, and Mitchell's blood test results.

A Fortis investigator reviewed the records and discovered the erroneously-dated intake note in Dr. Chandler's files. That information was then forwarded to Fortis Senior Underwriter Kate Stephens ("Stephens") for review. Stephens completed a "referral summary" for the rescission committee and recommended that Mitchell's policy be rescinded on the grounds that he had misrepresented his HIV positive status. Stephens's summary referenced the handwritten notation on the intake form as the sole foundation for her recommendation. Some time shortly thereafter, a Fortis employee – in all likelihood Stephens[1] – drafted an addendum to the referral summary, which read:

> The only question misrepresented on the Enrollment form is #20 – "Within the last 10 years has any proposed insured been diagnosed as having or been treated for any immune deficiency disorder." Can't use the question re: AIDS as he does not have AIDS, he has tested positive for the HIV virus. This is the only question I've found that we can use – any other suggestions?

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[1] The addendum was not signed. However, the record strongly supports the conclusion that Stephens was the author, a fact that Fortis neither admitted nor denied.

> Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?

The referral summary and addendum were sent to Fortis's rescission committee ("the committee"). On September 4, 2002, the committee conducted an approximately two-hour meeting, in which they considered forty-six cases, including Mitchell's. When it came time to consider Mitchell's case, the committee considered Stephens' referral summary and the addendum. The committee voted to rescind Mitchell's policy.

On September 5, 2002, Fortis sent Mitchell a letter informing him that his health insurance policy was rescinded due to a material misrepresentation on his application form. The letter stated that Fortis would "welcome any additional information you may have which would effect [sic] our decision to rescind your policy." Upon receiving the letter, Mitchell attempted to contact Stephens in order to inform her that he had not misrepresented his health status. Mitchell was directed to a customer service representative, who informed him that there was "nothing [the representative] could do" about the rescission.

Mitchell then sought the help of a case manager at the Hope Health free medical clinic. The manager called Stephens to inform her that she had medical records confirming that Mitchell first tested for HIV positive after he had purchased the Fortis policy. The manager offered to send these records to Stephens by fax or mail. Stephens spurned this offer and informed the manager "that there was nothing

she could do at this time."[2] Stephens did not provide any information regarding Mitchell's right to an appeal.

On June 4, 2003, Mitchell's attorney sent Fortis a copy of Dr. Chandler's initial test results along with a letter informing Fortis that Mitchell was first diagnosed with HIV in May 2002. One week later, Fortis advised Mitchell's attorney that it would review his appeal. The rescission committee met to consider Mitchell's appeal. The information before the committee consisted of a single notation that read: "letter from attorney stating that the insured did not misrep[resent] coverage since the first diagnosis of AIDS was 5/14/2002."[3] The committee denied Mitchell's appeal and upheld the rescission.[4]

PROCEDURAL BACKGROUND

On July 21, 2003, Mitchell filed this action for breach of contract and bad faith rescission of his health insurance, seeking actual and punitive damages.

At trial, Mitchell's insurance expert testified that it was Fortis's practice to shut down an investigation once a single piece of evidence was discovered that

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[2] Stephens had a similar conversation with Mitchell's insurance agent, who called to inquire about the rescission at the request of Mitchell's mother. Stephens explained that Mitchell had misrepresented a pre-existing condition on his application form, and provided no information regarding Mitchell's right to an appeal.

[3] This notation was in error, as Mitchell was HIV positive, and did not have AIDS.

[4] Fortis eventually reinstated Mitchell's policy on May 27, 2004, well after the litigation had begun.

would support rescission. Further, Mitchell introduced testimony from Fortis's manager of underwriting and correspondence – Stephens's direct supervisor – who testified that she was "not able to answer" whether she or any of her employees "had a responsibility to find out the truth" about a policyholder's medical conditions. On cross-examination, Fortis's insurance expert conceded that an insurance company has a duty to investigate and find information that may lead to payment of a claim.

In light of this testimony, Mitchell argued that Fortis acted in bad faith in rescinding his policy solely on the basis of the handwritten note from Dr. Chandler's files. Mitchell argued that there was ample countervailing evidence in his medical records to put any reviewer on notice that the handwritten note was erroneously dated.[5] Mitchell contended that the rescission committee, presented with the "addendum," which openly acknowledged that the investigation had uncovered no clear evidence that Mitchell was HIV positive prior to the inception of his contract with Fortis, rescinded Mitchell's policy in the

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[5] Deborah Poston, an employee of Carolina, testified that when Mitchell's counsel notified her on March 8, 2004 that there might be an error on one of the records, she reviewed the medical chart and determined that there was a discrepancy in the date. Poston testified that it took her "five minutes" to verify the correct date. She further indicated that all records are kept chronologically, and that the misdated note was included with 2002 medical records. Other contextual clues included Mitchell's age on the note, which indicated he was eighteen (he would have been seventeen in 2001), the corresponding day and month with the other records from Dr. Chandler's office, and Dr. Shea's referral summary, which Fortis claimed it did not have but Mitchell alleged was in the file.

course of what was likely no more than a three-minute review.[6]

Mitchell also argued that Fortis had tried to conceal evidence of its bad faith and that Fortis had twice sent them an illegible copy of the addendum to the referral form, and that Stephens's call log included no entry for her phone call with the Hope Health case manager. Mitchell questioned Fortis's practice of not maintaining records of its referral forms in the same manner as other company documents.

As to Mitchell's actual and potential harm and the determination of damages, Mitchell presented testimony from a medical expert who testified that without medical treatment, he would contract AIDS in two years and likely die two years after that. Mitchell introduced testimony from a health care expert who testified to the minimum expected costs that it would take to care for Mitchell throughout his life, not including complications from HIV and AIDS. Mitchell also introduced an economist who relied on the health care expert's figures to project a total present value of $1,081,189.40 for Mitchell's treatment and costs.

The jury awarded Mitchell $186,000 in compensatory damages, including $36,000 on the breach of contract claim and $150,000 on the bad faith rescission claim. The jury also awarded $15 million in punitive damages for the bad faith rescission claim.

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[6] Mitchell introduced evidence that forty-five other cases were considered with Mitchell's in a single two-hour meeting. Mitchell thus argued that it was unlikely that the committee spent more than three minutes on any one case, including Mitchell's.

Fortis filed post-trial motions to (1) elect remedies; (2) vacate, or in the alternative, remit the punitive damages award; and (3) for judgment notwithstanding the verdict or, in the alternative, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. The circuit court granted the motion to elect, and Mitchell elected actual and punitive damages on the bad faith cause of action. Following a hearing, the circuit court denied Fortis's remaining motions.

Fortis appealed and we certified the case pursuant to Rule 204(b), SCRAP. Fortis now submits the following questions for our review:

I. **Did the $15 million punitive damages verdict violate Fortis's constitutional right to due process?**

II. **Did the circuit court admit improper evidence at trial?**

III. **Did the circuit court err in denying Fortis's motion for judgment notwithstanding the verdict?**

IV. **Was the jury's verdict a result of passion, caprice, or prejudice?**

STANDARD OF REVIEW

As a preliminary matter, we restate the standard of review appellate courts should apply to a trial court's post judgment due process review of a punitive damages award. We have typically applied an abuse of discretion standard in reviewing a trial court's post judgment review of a punitive damages award. *See Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) ("[O]nly when the trial court's discretion is abused, amounting to an error of

law, does it become the duty of this Court to set aside the award."); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45, 61 (Ct. App. 2000) (evaluating the trial court's post-judgment review and finding "no abuse of discretion in the trial court's conclusions following its review of the jury verdict."). However, changes in the federal case law have persuaded us to adopt a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the United States Supreme Court held that courts of appeal should apply a de novo standard of review to district court determinations of the constitutionality of punitive damages awards. The Supreme Court identified three bases for its promulgation of a de novo review standard. First, the concepts involved in the due process analysis of punitive damages awards are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Cooper Industries*, 532 U.S. at 436 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Second, the due process criteria acquire content only through application, and "independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* (quoting *Ornelas*, 517 U.S. at 697). Third, "de novo review tends to 'unify precedent' and 'stabilize the law.'" *Id.* (quoting *Ornelas*, 517 U.S. at 697-98). We agree with this analysis.

For the reasons articulated in *Cooper Industries*, we find that determinations of the constitutionality of punitive damages awards are best conducted pursuant to a de novo review. Accordingly, we hold that

our appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award. *Cooper Industries*, 532 at 431.

LAW/ANALYSIS

I. Due Process and Punitive Damages

Fortis argues that the $15 million punitive damages award is so excessive as to violate its constitutional right to due process under the standards set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) (hereinafter "*Gamble*"), and *BMW of North America v. Gore*, 517 U.S. 559 (1996) (hereinafter "*Gore*"). We agree with this conclusion, although our analysis differs substantially from that urged by Fortis.

A. The History of Due Process Limitations on Punitive Damages Awards

The practice of awarding punitive damages originated in principles of common law "to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." Gore, 517 U.S. at 568. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir. 2003)).

Nevertheless, "while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm v. Campbell*, 538 U.S. 408, 416 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417.

Prior to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the United States Supreme Court had never directly considered the matter of whether a punitive damage award could be so excessive as to violate due process. In *Haslip*, the Court held that a punitive damages award more than four times the amount of compensatory damages did not violate the defendant's due process rights. However, the Court acknowledged that unlimited discretion in the fixing of punitive damages may invite extreme results that violate due process. The Court noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.* at 18. Since *Haslip*, the Court has built a healthy body of jurisprudence that adds substance and context to this area of law. *See TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993) (holding that the harm likely to occur from a defendant's conduct was relevant to the due process inquiry); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding that due process requires post-judgment review of a punitive damages award); *Gore*, 517 U.S. 559 (identifying three "guideposts" that assist a due process analysis); *Cooper Industries v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (adopting a de novo standard of review for determining the constitutionality of punitive damages awards); *Campbell*, 538

U.S. 408 (identifying evidence that, if used to support a punitive damages award, will violate due process); *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that a punitive damages award that is based on harm to others violates due process).

The Supreme Court expounded upon *Haslip*'s due process standard in *Gore*, where it held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." *Gore*, 517 U.S. at 575. In *Gore*, the Court first adopted a specific test by which to conduct a due process analysis. The Court established three guideposts that indicate whether the due process requirement of fair notice has been met. In determining the constitutionality of a punitive damages award, *Gore* directed that courts consider: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

Since *Gore*, much of the Supreme Court's punitive damages jurisprudence has focused on the type of evidence that may be used to support a punitive damages award. In *Campbell*, the Supreme Court held that punitive damages awards may not be based on out-of-state conduct and must be related to the plaintiff's injury or damage. "A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive

damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Campbell*, 538 U.S. at 421-22. Furthermore, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

Similarly, in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the Court held that a punitive damages award that is based on evidence of harm to persons other than the plaintiff or plaintiffs will violate due process. The Court noted that harm to others may be considered to help show that the conduct that caused the plaintiff's harm also posed a risk to the public, but the jury may not go further and base a punitive damages award on that evidence.

In these cases, the Supreme Court has continued to uphold *Haslip* and further delineate the contours of punitive damages awards that "run wild." *Haslip*, 499 U.S. at 19. Nevertheless, the Court has consistently declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18.

B. Gamble and Punitive Damages Review Under South Carolina Law

Our own jurisprudence has largely tracked the Supreme Court's constitutional pronouncements, beginning with our *Gamble* opinion, which was written in response to *Haslip*. In *Gamble*, we identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or

concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 302 S.C. at 111-12, 406 S.E.2d at 354.

We have said in the past that trial courts must consider both the *Gamble* and the *Gore* factors. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*."). However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis. We now hold that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts. With these considerations in mind, we articulate the following test for our courts in conducting a post-judgment review of punitive damages awards.

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the con-

duct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.[7] *Campbell*, 538 U.S. at 419.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id.* at 425-26. With this in-

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[7] We observe that this analysis adequately encompasses – and obviates the need for – the first four factors of the *Gamble* review, which include the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct.

struction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.[8] Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

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[8] We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. *Campbell*, 538 U.S. at 427. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

POST-JUDGMENT DUE PROCESS REVIEW IN THE INSTANT CASE

1. Reprehensibility

Turning to the facts of the instant case, we find ample support in the record to establish that Fortis's conduct was reprehensible.

First, Mitchell's harm was economic, rather than physical. This would typically weigh against the reprehensibility of Fortis's conduct. However, this case is unique in that Mitchell's economic harm – the termination of his health insurance policy – exposed him to great risk of physical danger.

Second, this truth is also relevant to the consideration of whether Fortis demonstrated an indifference to Mitchell's life and a reckless disregard to his health and safety. We conclude that Fortis did. The record is clear that a person with HIV, without proper medication, will develop AIDS and die within a relatively short time. But for the free medical services provided by Hope Health, Fortis's conduct would have deprived Mitchell of health insurance for at least three years, during which time his health would have surely deteriorated. The jury could have reasonably inferred from the evidence that Fortis deliberately ignored contextual and other evidence in order to rescind Mitchell's policy on the pretext of a misrepresentation. It was reasonable to conclude, from the evidence presented, that Fortis was motivated to avoid the losses it would undoubtedly incur in supporting Mitchell's costly medical condition. Based upon this evidence, we find that Fortis was deliberately indifferent to its contractual obligations and to Mitchell's health and wellbeing.

Third, Mitchell was financially vulnerable. Again, without the assistance of free medical services, Fortis's actions would have rendered him unable to obtain additional insurance.

Fourth, Fortis's conduct involved repeated acts of deliberate indifference for more than two years. Fortis reinstated Mitchell's policy nearly twenty months after it had been put on notice that the evidence upon which it relied was erroneous. The rescission committee decided to reject Mitchell's appeal even after his attorney contacted Fortis to emphasize the significance of the medical records which demonstrated that Mitchell had not misrepresented his condition at the time he applied for the policy.

Finally, there is ample evidence in the record to support a finding that the harm Mitchell suffered was a result of intentional deceit. Stephens' addendum acknowledged that the investigation yielded no clear evidence to establish that Mitchell's HIV positive status predated his policy with Fortis. The rescission committee, when presented with this information, elected to rescind Mitchell's policy. After the initial rescission, Stephens was contacted by Mitchell, Mitchell's Hope Health case worker, Mitchell's mother's insurance agent, and Mitchell's attorney to inform her that her information was inaccurate. Stephens did not appear at trial, and the jury was justified in drawing a negative inference from her unavailability.

Fortis's refusal to conduct a further investigation suggests that it was aware of its own wrongdoing. Furthermore, the lack of written rescission policies, the lack of information available regarding appeal rights or procedures, the separate retention policies for rescission documents, the omission of the case

manager's call from Stephens' phone log, and the inference evident from the record that Fortis was in possession of Dr. Shea's records as early as the summer of 2002, were all evidence that Fortis tried to conceal the actions it took in rescinding Mitchell's policy.

Based on these findings, we conclude that Fortis's conduct was highly reprehensible and that the imposition of punitive damages was appropriate.

2. Ratio

In reviewing the ratio guidepost, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff. The Supreme Court squarely addressed this issue in *TXO*, where the petitioner had brought a frivolous claim against the respondent's oil and gas rights in an effort to renegotiate its royalty arrangement with the respondent. 509 U.S. 443. The jury in that case awarded $19,000 in actual damages and $10 million in punitive damages. The petitioner argued on appeal that the 526 to 1 ratio was grossly excessive, but the Supreme Court found that there was ample evidence in the record to support an inference that petitioner was seeking a multimillion dollar reduction in its potential royalty obligation. The Supreme Court held that "it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. Although the Court did not designate a monetary value to the potential harm suffered by the respondent, it found that even the most

conservative approximations – each falling within a single-digit ratio to the $10 million punitive damages award – did not "jar one's constitutional sensibilities." *Id.* at 462.

Turning once again to the present case, there is ample evidence that Fortis's conduct would have potentially resulted in a great deal of harm to Mitchell if not for the free medical services of Hope Health. In reviewing the ratio guidepost, the circuit court found that because Mitchell's lifetime maximum payout on the rescinded health insurance policy was $6 million, "the potential economic loss to [Mitchell] from the wrongful rescission was thus" at least that amount. However, in this de novo review, we need not – and in this case should not – accept the circuit court's assertion that Mitchell suffered $6 million in potential harm. This figure is unsupported by the evidence and too speculative. Rather, the more appropriate measure of potential harm, supported by the evidence, is the present value of cost for the minimal evaluation and treatment of HIV over Mitchell's lifetime – $1,081,189.40. This figure bears a closer relation to Mitchell's potential risk than the $6 million maximum lifetime payout. It also bears a closer relation to the reprehensibility of Fortis's conduct because this figure represents the minimal pecuniary gain to Fortis in rescinding the policy. For these reasons, $1,081,189.40 is the accurate measure of the potential harm to which Fortis exposed Mitchell and is appropriately considered in evaluating the ratio to the punitive damages award.

The next question we must ask is whether a ratio of 13.9 to 1, based upon the $15 million punitive damages award and $1,081,189.40 in potential harm, is grossly excessive. We conclude that it is.

In *Campbell* , the Supreme Court observed that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." 538 U.S. at 425. Although the determination of whether a compensatory damage award is "substantial" is necessarily an imprecise and relative inquiry, it is safe to say that Mitchell's $150,000 in actual damages – excluding, for the moment, the $1,081,189.40 in potential harm suffered – is a fairly substantial compensatory damage award in South Carolina.

With that in mind, we find that a 13.9 to 1 ratio, in this particular case, exceeds due process limits. There is ample evidence in the record to support the imposition of punitive damages, and there is no need for further findings of fact. However, in order to determine the proper amount to remit, we must turn to the third *Gore* guidepost, which instructs us to compare the present award to civil penalties imposed in similar cases.

3. Comparative Penalty Awards

Although a thorough review of case law has uncovered no cases on all fours factually with the present case, South Carolina has a substantial, if somewhat dated, history of upholding punitive damages awards against insurance companies that fraudulently rescind their customers' health insurance policies. *See Kinard v. United Ins. Co.*, 237 S.C. 266, 116 S.E.2d 906 (1960) (where the jury awarded $200 in actual damages and $1,300 punitive damages against an insurer who stopped collecting the premiums from the insured, with knowledge from the claims filed and from the agent's observation that the insured was near death, so that the policy would

lapse); *Yarborough v. Bankers Life & Casualty Co.*, 225 S.C. 236, 81 S.E.2d 359 (1954) (where the jury awarded $7.50 in actual damages and $1,000 in punitive damages against an insurer who repudiated a health insurance policy by failing to send a notice of premiums due after the insured filed a claim for gall-bladder trouble, and attempted to have the insured agree to a retroactive rider excluding illnesses resulting from gall-bladder trouble); *Riley v. Life & Casualty Ins. Co.*, 184 S.C. 383, 192 S.E. 394 (1937) (where the jury awarded $36 in actual damages and $1,000 in punitive damages against an insurer who stopped collecting premiums from the insured after it was clear that his health was failing and with the obvious intention to cancel the life insurance policy);[9] *Jamison v. American Workmen Ins. Co.*, 169 SC 400, 169 S.E. 83 (1933) (where the jury awarded $20 in actual damages and $480 in punitive damages against an insurer who stopped notifying the insured when premiums were due after the insured became very ill in hopes that the insured would miss a payment and thereby justify rescission).

In reviewing more recent punitive damages awards, South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.[10] *See James*, 371 S.C. at 196-97, 638 S.E.2d at

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[9] These humble verdicts appear quaint in light of today's multimillion dollar awards. Nevertheless, it helps to keep in mind that this $1,000 punitive damages award was imposed for breach of a contract involving only $155 in life insurance, paid at a weekly premium of 25 cents.

[10] Fortis is correct to observe that most of South Carolina's punitive damages awards have been on the low end of the single-

671-72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). *Cf. Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392-93 (overruling a 127 to 1 ratio).

In our view, the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio. *See Campbell*, 538 U.S. at 425 (observing that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process). Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing this punitive damages award. In assessing this remittitur, we place great emphasis upon that consideration.

We therefore remit the punitive damages award to $10 million, resulting in a ratio of 9.2 to 1. We believe a $10 million award in this case satisfies due process and comports with South Carolina law. We are also certain that a $10 million award will adequately vindicate the twin purposes of punishment and deterrence that support the imposition of punitive damages.

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digit-ratio spectrum. That does not mean the constitution requires this to be so.

II. Evidence at Trial

Fortis argues that the judgment should be vacated, or judgment rendered in its favor, because the circuit court erred in admitting certain evidence. We disagree.

A. Other Rescissions

Fortis argues that the circuit court allowed the jury to consider evidence that the rescission committee harmed nonparties to the suit, in violation of its constitutional rights. *See Campbell*, 538 U.S. at 420. Fortis asserts that the jury should not have considered evidence indicating that forty-five other rescission cases were considered with Mitchell's in the course of a two-hour committee meeting. This argument is without merit. It is evident from the record that Mitchell introduced this evidence in order to establish the inference that Fortis could not have spent more than three minutes in deliberating the rescission of Mitchell's policy. Fortis could have defended itself from such evidence had the rescission committee kept minutes in its meetings. The circuit court did not err in allowing this evidence.

B. Post-claim Underwriting

Fortis argues that the circuit court erred in allowing testimony regarding Fortis's retrospective investigation practices, also known as "post-claim underwriting." Fortis asserts that expert testimony indicating that this practice is unlawful in "at least half a dozen states" constituted evidence of out-of-state conduct that violated Fortis's constitutional right to due process. *See Campbell*, 538 U.S. 408. We disagree.

Fortis argues that, as a general matter, post-claim underwriting is "perfectly lawful" in South Carolina. However, in the context of this case, Fortis's post-claim underwriting practices played a pivotal role in the harm inflicted upon Mitchell in South Carolina. This evidence was probative of Fortis's bad faith conduct, and was properly submitted to the jury.

C. Improper Litigation Conduct

Fortis argues that the trial court erred in allowing the jury to consider evidence that Fortis engaged in "improper conduct" following the September 4, 2002 rescission committee meeting on the grounds that "dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 538 U.S. at 422. We disagree for three reasons.

First, the rescission was not final until June 2003 review of Mitchell's "appeal." At a bare minimum, all evidence of concealment until that point is allowable. Second, this evidence is probative of Fortis's bad faith liability, not punitive damages. Lastly, Fortis waived any objection to the admission of evidence of bad acts that occurred after the second rescission committee meeting by: (1) repeatedly emphasizing their own "good act" of reinstatement following the "temporary" rescission, and (2) repeatedly arguing that Mitchell himself acted negligently in failing to submit additional information prior to March 8, 2004.

D. Value of Mitchell's Free Medical Treatment

Fortis argues that the circuit court erred in allowing the jury to consider the value of the free med-

ical care Mitchell received from Hope Health. We disagree.

The value of Mitchell's free medical care is relevant to the determination of damages because the collateral source rule provides that an award for damages should not be decreased if the plaintiff receives compensation for all or part of the damage from a collateral source. *See Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003) (holding that the proper measure of damages is the "reasonable value" of the medical services, even if the plaintiff receives the treatment free or at a discount). In this case, the value of Mitchell's free medical treatment is necessary to the determination of the amount of damage Fortis inflicted upon Mitchell in rescinding his policy.

E. Mitchell's Future Medical Expenses

Fortis argues that the circuit court erred in allowing the jury to consider the value of the Mitchell's future medical expenses. This objection, however, is meritless. This evidence is probative of Fortis's financial motive to rescind Mitchell's policy, and we find it is relevant to Mitchell's allegations of bad faith.

F. Mitchell's Risk of Death Without Appropriate Medication

Fortis argues that the circuit court erred in allowing the jury to consider the risk of death Mitchell faced without treatment, because it was "irrelevant, highly prejudicial, and . . . inflamed the jury." We find this assertion to be entirely without merit. Evidence of the risk Mitchell faced without health insurance coverage is properly admissible to establish

Fortis's reprehensibility and support an award for punitive damages.

III. Fortis's Motion For JNOV

We find it patently clear from the record that there is no support for Fortis's claim that "the evidence as a whole is susceptible to only one reasonable inference" that Fortis was not liable for bad faith rescission of Mitchell's health insurance policy.

IV. Passion, Caprice, And Prejudice

Similarly, we find no credible evidence anywhere in the record to support Fortis's contention that "the jury's $15 million punitive damages award and/or its $150,000 compensatory damages award were the result of passion, caprice, or prejudice, and therefore must be reversed and a new trial ordered."

CONCLUSION

For the forgoing reasons, we affirm the jury's finding of liability on the bad faith cause of action, affirm the $150,000 compensatory damages award, and remit the $15 million punitive damages award to $10 million.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

APPENDIX B

[Order of the Court of Common Pleas, Florence County, South Carolina, deciding post-trial motions (July 19, 2006)]

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT

2003-CP-21-1347

JEROME MITCHELL JR., PLAINTIFF,

VS.

FORTIS INSURANCE COMPANY, DEFENDANT

ORDER

[1] Date of Hearing: June 13, 2006

Appearances: Edward L. Graham, Sallie P. Phelan and Brian D. Phelan of the Graham Law Firm, P.A., for Plaintiff;

J. Boone Aiken, III and Jay M. Saleeby, Jr. Of Aiken, Bridges, Nunn, Elliott & Tyler, P.A., for Defendant.

This matter came before the Court on Tuesday, June 13, 2006, for a Hearing on Defendant's Post-Trial Motions. The Motions include: "Motion to Require Plaintiff to Elect Remedies;" "Defendant's Motion to Vacate or, in the Alternative, Remit the Punitive Damages Award under Gamble v. Stevenson;"

and "Defendant's Motion for Judgement Notwithstanding the Verdict or, in the Alternative, for a New Trial Absolute, or, in the Alternative, for a New Trial Nisi Remittitur." Each will be addressed in turn.

I. MOTION TO ELECT REMEDIES

Defendant Fortis Insurance Company (hereinafter, "Fortis") requested the Court to require Plaintiff to elect remedies pursuant to Nichols v. State Farm Mutual Automobile Insurance Co., 279 S.E. 336, 306, S.E2d 616 (1983). Plaintiff acknowledged the requirement to [2] elect remedies, and elected the actual and punitive damages verdicts on the bad faith cause of action.

II. MOTION TO VACATE OR REMIT THE PUNITIVE DAMAGES AWARD UNDER GAMBLE V. STEVENSON

A. GAMBLE FACTORS:

Under the case of Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), this Court is required to review the jury's punitive damages verdict and give consideration to the following eight factors:

1. *Defendant's degree of culpability;*
2. *Duration of the conduct;*
3. *Defendant's awareness or concealment;*
4. *The existence of similar past conduct;*
5. *Likelihood the award will deter the Defendant or others from like conduct;*
6. *Whether the award is reasonably related to the harm likely to result from such conduct;*
7. *Defendant's ability to pay; and*
8. *"Other factors" deemed appropriate.*

The Court will address each in turn.

1. *Defendant's Degree of Culpability.*

Fortis argues that its culpability was limited because of its alleged right to rely upon the [3] erroneous date on the Carolina Family Practice's handwritten office note. Fortis claims that date, May 14, 2001, reasonably led it to the erroneous belief that Plaintiff had tested positive for HIV the day before he applied for his health insurance policy on May 15, 2001. However, the correct date for that office visit and his HIV diagnosis was a year later in May 2002, a year after he had applied for insurance.

Contrary to Fortis' assertion that it reasonably relied on this one handwritten office note in rescinding Plaintiff's health insurance when Plaintiff was faced with a life-threatening illness, the court finds that Fortis' culpability with regard to this case was extreme and outrageous. The insurance contract between the parties created a quasi-fiduciary duty on the part of Fortis toward its insured. Plaintiff paid

his premiums and was entitled to benefits under the policy. When he contracted HIV, that billing code was recognized by Fortis's computer, thereby triggering an automatic investigation for fraud. When the investigation identified one snippet of suspicious evidence of misrepresentation, i.e., the erroneous date on a handwritten office note, Fortis abruptly ended its investigation and rescinded Plaintiff's policy. Fortis ignored other entries on medical records from the same office which put Fortis on notice that the date may be erroneous. Before rescinding Plaintiff's health insurance Fortis did not even call the Plaintiff to offer him the opportunity to respond to Fortis' allegations of misrepresentation by him. An insurance company is entitled to investigate for potential misrepresentation, but discovery of suspicious information should cause a fair, impartial and thorough investigation to be conducted, not for an investigation to end just because it serves the insurance company's interest in crafting a reason to rescind an insured's policy.

The handwritten office note on which Fortis argues it had a right to rely is unreliable for [4] several reasons. The office note showed that Plaintiff was 18 years old, which was his correct age on May 14, 2002, but not a year earlier. The record neither contained a diagnosis of HIV from a physician nor did it report specific laboratory test findings. Furthermore, it did not reveal the source of the letter telling Plaintiff he had HIV and did not indicate what specific information led to the letter being written to the Plaintiff. Moreover, Fortis' billing records alone should have given notice to Fortis that the 2001 date was incorrect. Fortis had bills from May 14, 2002 for drawing Plaintiff's blood and for the lab testing which led to the confirmed diagnosis of HIV, while Fortis had not

received a single bill for diagnostic testing or treatment of HIV during 2001 or before May of 2002. Fortis had no medical record to match up with the May 14, 2002 bill. The other medical records from 2001 and 2002 which Fortis admits reviewing did not contain any indication whatsoever that Plaintiff had been diagnosed or treated for HIV.

Not only did Fortis choose to rely on one false and unreliable snippet of information containing an erroneous date to the exclusion of other information which would have revealed that date to be erroneous, Fortis refused to conduct any further investigation even after it was on notice the evidence which aroused its suspicion may be false. Despite being called by the Plaintiff, the local agent, and Mary Wiggins, who was Plaintiff's counselor at Hope Health, Fortis chose to consider the rescission a closed issue. Mary Wiggins provided compelling testimony on that subject. Ms. Wiggins testified that she telephoned Kate Stephens, the Fortis employee who sent the rescission letter to Plaintiff. Ms. Wiggins testified she explained to Kate Stephens that Plaintiff did not know that he had HIV until May 2002, and that she had the medical records to prove it. She further testified that she offered to fax those records to Kate Stephens, but that Kate Stephens declined. She described Ms. Stephens' tone of voice in that [5] conversation as being rude. There was testimony that Kate Stephens told Mary Wiggins that she already had all the information that she needed.

In June 2003, one of Plaintiff's attorneys, Sallie Phelan, wrote Kate Stephens to again inform her that Plaintiff did not know he had HIV until May 2002. That letter enclosed a copy of the lab report

dated May 14, 2002 which established the diagnosis, and which contained a handwritten note referring Plaintiff to Dr. Shea, an infectious disease specialist. That letter demanded reinstatement as well as a monetary settlement. Despite the contents of that letter and its enclosure, Fortis chose to stand by its rescission and failed to conduct any further investigation to ascertain the facts of the timing of Plaintiff's HIV diagnosis and treatment. This is especially telling of Fortis' wrongful and bad faith handling of Plaintiff's policy given that Fortis had authorization to obtain the medical records which would have easily revealed the error of Fortis' position that Plaintiff had misrepresented his health on his application.

The video deposition testimony of Barbara Delgadillo, Fortis' underwriting manager, also speaks volumes about the extreme culpability of Fortis. Ms. Delgadillo was the supervisor of Kate Stephens when Ms. Stephens made the recommendation to rescind Plaintiff's policy.

By relying on the erroneous date when it had ample notice from numerous sources that the date was not accurate or reliable, the court finds that Fortis acted without regard for the rights of the Plaintiff. According to the uncontroverted testimony in this case, but for the free health care Plaintiff received at Hope Health, Plaintiff's HIV would have become AIDS in two years; and if his AIDS were untreated, he would have most likely died within one to two years thereafter.

The evidence shows Fortis was faced with exposure to very high claims from Plaintiff [6] when Fortis decided to rescind his health insurance. Fortis faced the present value of cost for minimal evaluation and treatment of HIV over Plaintiff's lifetime of

approximately $1,080,000 (One million, eighty thousand dollars), plus possible claims for treating AIDS, plus the usual claims for various illnesses and injuries that may arise for any customer. Fortis faced the risk of up to a maximum cost of the policy's $6,000,000 (Six million dollars) lifetime benefit limit. the court finds that in rescinding the policy without a good faith, impartial and thorough investigation, Fortis was motivated to rid itself of costly claims from a customer with a medical condition that would be expensive to treat. The court finds Fortis wrongfully elevated its concerns for maximizing profits over the rights and interests of its customer.

The court also finds Fortis' efforts to blame Carolina Family Practice, the Plaintiff and his agents evidence of Fortis' great degree of culpability in this case. It is not the Plaintiff's duty to investigate for Fortis. Moreover, Fortis' lack of documentation of its actions in rescinding and upholding the rescission of insureds' policies, as well as the cursory review which is conducted of these policies, evidence Fortis' course of conduct in rescinding health insurance policies without proper investigation and review.

Fortis gambled with Plaintiff's life. Fortis gambled about whether Plaintiff would have the resources and fortitude to proceed with legal action against Fortis and maintain the action through a jury trial. the court finds Fortis' actions in this case were reprehensible, and justify the jury verdict of $15,000,000 (Fifteen million dollars) in punitive damages.

2. Duration of Conduct.

[7] On September 5, 2002, Fortis rescinded Plaintiff's policy retroactively to the policy's incep-

tion date of May 15, 2001. Fortis' letter reinstating the policy is dated May 27, 2004. Plaintiff's policy was thus rescinded in excess of three years. The court finds the duration of the rescission supports a high award of punitive damages.

Fortis repeatedly chose to cling to its assertion that Plaintiff had misrepresented his condition on May 15, 2001, yet Fortis was on notice from multiple sources that its information about the date of diagnosis was incorrect and unreliable. Despite telephone calls from Plaintiff, the local sales agent and Mary Wiggins, Fortis refused to acknowledge even the possibility of its error and refused to conduct any additional investigation. When Fortis received the letter and enclosed Labcorp report from attorney Sallie Phelan in June 2003, Fortis did not conduct any further investigation, but stood by its rescission. It was not until May 27, 2004, approximately twenty months after Fortis had been put on notice of its error by the Plaintiff and his agents, that Fortis reinstated the policy.

Throughout trial, Fortis not only blamed Carolina Family Practice for writing an erroneous date, but also tried to blame the Plaintiff's lawyers for not providing Fortis with additional medical records they had obtained as an enclosure with a letter dated June 4, 2003. Fortis made repeated contentions during trial that it reinstated the policy just as soon as it finally received records showing the May 2001 date was incorrect. In fact, the evidence proves that Fortis obtained Dr. Shea's records in discovery in November 2003[1] and chose not to reinstate the policy

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[1] An inference could be made that Fortis had Dr. Shea's records since the summer of 2002. See infra p. 10, line 14–p. 11, line 2.

until May 27, 2004. the court finds the duration of misconduct supports a large punitive damages award.

3. [8] Defendant's Awareness or Concealment.

The evidence proves that Fortis' employees were aware there was no sound basis to rescind Plaintiff's policy. The Addendum attached to the referral form written by Kate Stephens, the underwriter recommending rescission, is most telling of Fortis' recognition and awareness that there was no substantial basis to support rescission of Plaintiff's policy. The Addendum provides as follows:

> Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?

The Addendum also asks the rescission committee if they have any other suggestions as to a basis for rescinding the Plaintiff's policy. The Addendum reveals Fortis' awareness that there was no lab report and no diagnosis by a physician to support Fortis' rescission based on misrepresentation.

The refusal to objectively conduct further investigation into the facts also suggests an awareness of wrongdoing. Fortis refused to investigate further despite being told numerous times that its decision was based on erroneous information. Telling Mary Wiggins not to fax records which would have forced Fortis to reverse the rescission is compelling proof of Fortis' awareness of wrongdoing. Such awareness supports a large amount of punitive damages.

The evidence proves Fortis attempted in numerous ways to conceal its actions. There were no written policies and procedures at Fortis for (a) under what facts and circumstances recommendations about possible rescission should be made; (b) how recommendations for rescission should be acted upon; or (c) activities of the rescission committee. No minutes were [9] kept of actions, votes, or any business conducted during the rescission committee's meeting.

Additionally, evidence was presented that Fortis conceals an insured's rights to challenge a rescission by not providing any information to its customers about appeal rights and procedures at the time of rescission. In this case, Fortis did not even inform Plaintiff that he had appeal rights despite several communications with the Plaintiff or his agents questioning the rescission, nor did Fortis advise Plaintiff he would have to appeal in writing. Moreover, there were no written policies or procedures to govern the appeal process at Fortis. There was testimony that Fortis had grievance procedures for existing customers, but not for Plaintiff. Once his policy was rescinded and he was no longer considered a customer, Plaintiff was no longer permitted to make a grievance.

There was also evidence presented that Fortis conceals information through its document retention practice. Fortis' stated policy for the last nine years has been to microfilm and destroy all documents. However, a document presented at trial contained language at the foot of the document which stated: "FOR INTERNAL USE ONLY. DO NOT MICROFILM." Carol Judd, Fortis' Director of Imaging, could not explain that contradiction, nor could she

answer how many other documents relating to Plaintiff were marked for internal use only and not microfilmed. There was also evidence that documents and/or other records regarding Plaintiff's policy were deleted; and that telephone logs and recordings contained key omissions. Fortis provided no explanation of why Mary Wiggins' call with Kate Stephens was not logged or recorded when Kate Stephens' other telephone calls that same day were both logged and recorded. Kate Stephens was not called as a witness. A jury could easily infer that Fortis destroyed and/or concealed any documentation of Ms. Wiggins' phone call when relatively [10] generic and benign calls were recorded, but a call which would be potentially harmful to Fortis that took place on the same day with the same Fortis employee was neither logged nor recorded.

There was also evidence from which the jury could have inferred that Fortis originally had the May, 2002 lab report and records from Plaintiff's treating physician, Dr. Shea which definitively established the date of Plaintiff's diagnosis and treatment in 2002; but which Fortis chose to ignore and conceal when it decided to rescind the policy. Debra Poston, custodian of Plaintiff's Carolina Family Practice medical records, testified that when Fortis requested records from her office, the records consisted of eight pages, the five pages Fortis admitted having, plus the Labcorp report dated May 14, 2002, plus a two page report from Dr. Shea dated May 23, 2002. Ms. Poston testified that those eight pages would have ordinarily been supplied to Fortis unless Fortis specifically requested less than all of the medical records. Moreover, Fortis requested only itemized bills directly from Dr. Shea, but no records. An infe-

rence may be drawn that Fortis did not need Dr. Shea's records, because Fortis already had them.

Fortis also concealed its actions in the manner with which documents were provided to Plaintiff. The Addendum document was originally produced to Plaintiff's counsel in a completely illegible form. When Plaintiff pressed repeatedly through discovery motions for a legible copy, only marginally better copies were produced. Yet in January 2006, Ms. Judd produced clear and legible copies of the Fortis file during her deposition, which she testified took her ten minutes or less to obtain. Those copies were made from the original microfilm kept steps from her office. Much greater effort was necessary to obtain the illegible copies furnished to Plaintiff.

Plaintiff presented substantial evidence from which a jury could infer a pattern of [11] secrecy and concealment by Fortis in this case. That also supports a high award of punitive damages.

4. The Existence of Similar Past Conduct.

On at least four different occasions, Fortis ignored the Plaintiff and his agents' attempts to inform Fortis that it wrongfully rescinded the Plaintiff's policy. On these same occasions, Fortis repeatedly failed to notify Plaintiff that he had any rights to appeal Fortis' decision to rescind his health insurance.

In addition to these acts towards the Plaintiff, there was evidence that Fortis has for some time been making recommendations for rescission, and acting on those recommendations, without a good faith investigation conducted fairly and objectively. The evidence shows that Fortis does not obtain the base-line medical records for all applicants who apply for Fortis' health insurance. Instead, Fortis pre-

programmed its computer to recognize billing codes for expensive health conditions, which triggers an automatic fraud investigation by its "Cost Containment" division whenever such a code is recognized. For as long as Fortis' computers have been programmed to do so, Fortis has started an investigation of its insured, not because of anything suspicious in the application or based upon any actions of the insured, but because a customer contracted a potentially expensive illness or condition. Only then does Fortis obtain medical records, looking for any basis upon which to rescind a policy.

Evidence was presented that Fortis has never had written policies and procedures about when rescission should be recommended; how such recommendations should be acted upon; nor [12] the actions of the rescission committee. There was evidence that Fortis' general counsel insisted years ago that members of the rescission committee not record the identity of the persons present and involved in the process of making a decision to rescind a Fortis health insurance policy. The evidence shows that Fortis' rescission committee spent very little time reviewing its rescission decisions, but rather merely rubber-stamped the rescission recommendation. Fortis' rescission committee also did not call insureds during this process to learn the insured's position, nor did anyone else at Fortis call the insureds to inform them about appeal matters.

The fact that Fortis has engaged in similar past conduct is another factor which justifies a relatively high award of punitive damages. Prior wrongful conduct by Fortis in this case includes stopping fraud investigations when any suspicious evidence is found, absence of effective procedures governing res-

cission, and keeping customers in the dark about appeal matters. The probability of Fortis repeating such conduct in the future absent an award of punitive damages is clear.

5. Likelihood the Award Will Deter the Defendant or Others From Like Conduct.

The court finds the jury verdict on punitive damages will likely deter the Defendant and other insurance companies from similar acts of bad faith. Absent a sizeable award of punitive damages, it is unlikely that Fortis or other insurance companies would be motivated to avoid such misconduct in the future.

6. Whether the Award is Reasonablely Related to the Harm Likely to Result from Such Conduct.

[13] The Court finds the jury verdict on punitive damages is reasonably related to the harm likely to result from the misconduct by Fortis. Fortis disregarded the effect its rescission would have on Plaintiff's health. Plaintiff's current treating infectious disease specialist, Dr. Zaw Htay, testified that had Plaintiff not been able to receive free medical care for his HIV from Hope Health, Plaintiff's HIV would likely have become AIDS within two years; and if his AIDS were untreated, Plaintiff's death was likely within another one to two years. But for the free medical care Plaintiff obtained from Hope Health, Plaintiff would have suffered a decline in his health leading to his untimely death. Accordingly, the court finds the punitive damages award is reasonably related to the harm likely to result from such conduct.

7. Defendant's Ability to Pay.

The court finds that Fortis is able to pay the punitive damages award. Testimony provided by Dr. Oliver Wood, a renowned expert in South Carolina on the financial standing of corporations, proves that Fortis has ample resources to pay the punitive damages verdict. As of March 2005, the last date for which such information was available to Dr. Wood, Fortis' capital surplus or net worth was $296,364,000 (Two hundred ninety-six million, three hundred sixty-four thousand dollars). Records from the South Carolina Department of Insurance certified that in December of 2005, Fortis had excess capital reserves, above that required by South Carolina law to operate as a [14] health insurance company within this state, of $256,996,066 (Two hundred fifty-six million, nine hundred ninety-six thousand and sixty-six dollars). Dr. Wood testified that Fortis' earnings in 2004 were approximately $127,774,000 (One hundred twenty-seven million, seven hundred seventy-four thousand dollars). Dr. Wood further testified that Fortis was able to pay its shareholders dividends of $40,000,000 (Forty million dollars) in 2004, and $271,000,000 (Two hundred seventy-one million dollars) over the four years ending in 2004. Dr. Wood also testified that even apart from its normal business activities, Fortis earned $36,191,000 (Thirty six million, one hundred ninety-one thousand dollars) per year in 2004 in its net investment income alone. That represents the sum of $695,981 (Six hundred ninety-five thousand, nine hundred eighty one dollars) per week. Net investment income for the first three months of 2005 was $10,477,000 (Ten million, four hundred seventy-seven thousand dollars), the equivalent of $805,923 (Eight hundred five thousand, nine hundred twenty-three dollars) per week. Based on

these facts and figures, it is obvious that Fortis has the ability to pay the punitive damages award.

8. "Other Factors" Deemed Appropriate.

As the court observed the witnesses' demeanor, listened to their tone of voice, and reviewed the documentary evidence in this case, the court was struck by what a callous attitude Fortis exhibited toward the Plaintiff. He did nothing wrong, but they investigated him for fraud because he contracted HIV. Although the Plaintiff did nothing suspicious himself to [15] warrant an investigation for fraud, the company chose to stop its investigation once it located and latched onto a suspicious entry on a handwritten note from a medical office taken out of context. Fortis refused to pay benefits under the insurance contract for Plaintiff's HIV evaluation and treatment without conducting a fair, objective and thorough investigation to see if the date on the handwritten note was accurate and reliable. Fortis did not even give the Plaintiff the courtesy of a telephone call to ask for his side of the story.

When Fortis finally reinstated Plaintiff's policy and offered to pay medical bills Plaintiff incurred during the time when he had no health insurance, Fortis acted as though it deserved to be applauded for a generous offer. The obvious reality, however, is that there were minimal medical expenses incurred by Plaintiff after he learned that Fortis had rescinded his policy. Yet on several occasions during trial, Fortis brought up its offer to reimburse Plaintiff for his minimal bills. When faced with the prospect of the value of the Hope Health treatment, however, Fortis argued that it should not be responsible for those costs as the Plaintiff did not have a legal obligation to repay Hope Health. Fortis' offer to

reimburse Plaintiff's minimal health costs after rescission stands in stark contrast to its position that it should not be responsible for the value of Plaintiff's medical care at Hope Health. This juxtaposition exemplifies Fortis' insincerity and failure to acknowledge the grave consequences of its misconduct. The court finds and conclude that these other factors and considerations serve as additional justification for the jury's $15,000,000 (Fifteen million dollars) punitive damages verdict.

B. GORE FACTORS:

[16] Under State Farm Mut. Auto Ins. Co. vs. Campbell, 568 U.S. 408 (2003), and BMW of North America, Inc. vs. Gore, 517 U.S. 559 (1996), this Court must also review the punitive damages with regard to the following three guideposts:

1. *the degree of reprehensibility of the Defendant's misconduct;*
2. *the disparity between the actual or potential harm suffered by the Plaintiff and the punitive damages award; and*
3. *the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (Emphasis added.)*

1. *Decree of Reprehensibility.*

Reprehensibility analysis is essentially the same as culpability analysis under South Carolina Law. In State Farm v. Campbell, supra, the U. S. Supreme Court directed courts to determine reprehensibility by considering whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of

the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 538 U.S. at 419, 123 S. Ct. at 1521. Plaintiff was vulnerable both financially and in terms of his health. For that reason and the reasons the court found Fortis' culpability to be extreme and outrageous, the court finds its misconduct to be highly reprehensible. See paragraph, II A (1) supra.

2. Disparity Between the Actual or Potential Harm Suffered by the Plaintiff in the [17] Punitive Damages Award.

Fortis argues that the punitive damages verdict is unconstitutionally excessive because it is one hundred times the compensatory damages award. That argument is wrong for two reasons.

First, that argument ignores the United States Supreme Court's steadfast refusal to create a bright line by which to evaluate the ratio of punitive damages to actual or potential damages. As stated in State Farm vs. Campbell, supra, : "[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." 538 U.S. at 424-425, 123 S.Ct. at 1524 (Emphasis in original). The Court further clarified: "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" 538 U.S. at 425, 123 S. Ct. at 1524.

Second, Fortis' argument ignores that the United States Supreme Court, when discussing ratios, defines the appropriate values underlying the ratio analysis to be a comparison of the punitive damages award to the actual or *potential* harm suffered by the Plaintiff. Whether reckless, willful wrongdoing, in conscious disregard of the Plaintiff's rights, is subject to a significant award of punitive damages depends not on the actual damages awarded by the jury but the potential harm to the Plaintiff from that wrongful conduct. When a wrongdoer acts in such a way as to create a risk of potentially catastrophic injuries, losses and damages, the mere fact that a Plaintiff was fortunate to avoid the worst potential harm or mitigated his damages through his own efforts, should not shield the wrongdoer from exposure to a high punitive [18] damages award. In this case Fortis should not benefit from the Plaintiff's mitigation of his damages by obtaining free medical care. But for Plaintiff obtaining that care, his actual damages would have been dramatically increased. This principle was recognized by the United States Supreme Court in the case of TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993), in which the jury had awarded $19,000 (Nineteen thousand dollars) in actual damages and $10,000,000 (Ten million dollars) in punitive damages. Although the ratio between the punitive award and the award of actual damages was 526 to 1, the ratio of punitive damages to *potential* damages was recognized to be substantially lower, no more than ten to one. Because of that consideration, the U.S. Supreme Court determined the award of punitive damages in TXO Production to be constitutionally permissible. As the court noted:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. 509 U.S. at 460, 113 S.Ct. at 2721-2722 .

Moreover, Fortis also fails to recognize that Plaintiff could have contracted another illness or suffered serious injuries in an accident that would have been covered by the policy but for the rescission. This type of occurrence should also be considered in analyzing the potential harm of Fortis' actions.

In this case, the Plaintiff's policy which was wrongfully rescinded had a $6,000,000.00 (Six million dollar) lifetime maximum payout. The potential economic loss to Plaintiff from the wrongful rescission was thus at least $6,000,000.00 (Six million dollars). This is especially true given Plaintiff's relatively young age at the time of the recission. Moreover, Plaintiff would [19] have faced a grievous illness and miserable death had he been unable to obtain free medical care. As Dr. Htay clearly testified, Plaintiff's HIV condition in May, 2002 was such that, absent treatment, it would have progressed to AIDS within two years; and his AIDS, if untreated, would have resulted in death within one to two years thereafter. Fortunately, Plaintiff avoided AIDS and an untimely death by seeking and receiving free medical care through Hope Health. The potential harm likely from Fortis' wrongful rescission, however, must take into account that Fortis gambled with the Plaintiff's health and life knowing that he had a serious and deadly condition. Therefore, the potential

harm from Fortis' wrongdoing includes the catastrophic progression of HIV to AIDS, and further progression from AIDS to painful, wretched deterioration and ultimate death. The courts in this state have recognized that the wrongful death of a twelve year old child under less gruesome circumstances merited compensatory damages of $3,000,000.00 (Three million dollars). Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000); Knoke v. South Carolina Dept. Of Parks, Recreation and Tourism, 324 S.C.136, 478 S.E.2d 256 (1996). It is not unreasonable to conclude that the potential harm to Plaintiff or anyone similarly situated from the wrongful rescission by Fortis would have a value in the range of at least three to six million dollars or more.

Comparing the punitive damages verdict to the potential harm numbers presented above (Six million dollar lifetime medical benefits; Three million dollars for the death of a twelve year old), the resulting ratio of punitive damages to potential harm is no more than between five to one and two and a half to one. Both of these ratios are well within the guidelines approved in other cases by both the U.S. Supreme Court and the appellate courts of South Carolina. See, e.g., TXO Production, supra; Collins Entertainment Corp. v. Coats and Coats Rental [20] Amusement, 2005 WL 3954000 (S.C. 2006); Hundley, supra; Taylor v. Medinica, 324 S.C. 200, 479 S.E.2d 35 (1996); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

3. Difference Between the Punitive Damages Awarded by the Jury and the Civil Penalties Authorized or Imposed in Comparable Cases.

Fortis argues that the third Gore guidepost requires the Court to measure the punitive damages verdict against fines which can be imposed by the South Carolina Department of Insurance. Even though the Department of Insurance may cancel Fortis' insurance license in South Carolina under certain circumstances, Fortis argues that the value of its insurance license should not be properly considered, claiming there was no evidence of repeated misconduct by Fortis in South Carolina to justify the loss of its license. That argument misses the point.

In reviewing this third Gore guidepost, this Court is not limited to considerations of monetary administrative fines which might be imposed by the Department of Insurance. The South Carolina Supreme Court recognized in the case of Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385 (2004) that the third guidepost of Gore requires the court to compare the subject punitive damages award with other civil penalties which may be imposed in comparable cases, including awards of punitive damages in civil litigation. 604 S.E.2d at 171. As noted above, the amount of the punitive damages award in this case compares favorably with other awards which have been upheld in South Carolina and other states, particularly when the focus is properly placed on the potential harm to Plaintiff and others similarly situated.

[21]For the reasons stated, the court is convinced that the jury verdict on punitive damages in this case was just and proper. My review of the Gamble

factors as well as the Gore guideposts leads me to conclude that the amount of the award is justified by the culpability and reprehensibility of Fortis' misconduct, by the callous and reckless disregard Fortis exhibited for the Plaintiff's health and life, and by the other facts and circumstances mentioned above. For example, if the jury had awarded only ten times the actual damages verdict, or $1,500,000.00 (One million, five hundred thousand dollars), that would represent a victory for Fortis. Fortis and other insurance companies would be encouraged to engage in similar bad faith conduct in an attempt to avoid costly medical treatment claims when facing the potential costs of a projected lifetime medical treatment plan of $1,080,000.00 and policy limits of $6,000,000.00. In my opinion the purposes of a punitive damages award could not be realized in this case without a substantial award of punitive damages such as that awarded by the jury.

III. MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, FOR A NEW TRIAL ABSOLUTE, OR IN THE ALTERNATIVE, FOR A NEW TRIAL NISI REMITTTITUR.

Defendant contends there was no evidence of bad. faith or unreasonable action in rescinding the policy. Defendant relies on the cases of Howard v. State Farm Mut. Auto Ins. Co., 316 S.C. 445, 450 S.E. 2d 582 (1984) and Crossley v. State Farm Mut. Auto Ins. Co., 307 S.C. 354, 415 S.E. 2d 393 (1992). The court disagrees.

The record is replete with evidence that creates a factual question for the jury whether [22] the Defendant acted unreasonably in rescinding the policy and denying Plaintiff's claims. The handwritten office

note on which Fortis seeks to rely was ambiguous on its face, in that it listed Plaintiff's age as 18 years old, which was his correct age on May 14, 2002, but not on May 14, 2001. That handwritten note does not reflect any diagnosis by a physician and does not contain any record of any treatment for an immune deficiency disorder. At the time of rescission, Fortis did not even know who authored the handwritten office note, and Fortis had no lab results at the time it cancelled Plaintiff's policy. Moreover, the sequencing of the Carolina Family Practice records places the handwritten note after the May 18, 2001 office visit for the college physical. The chronological sequence of those records raises an inference that the date on the handwritten note may be erroneous. An inference may also be drawn that Fortis had the May 14, 2002 LabCorp report and Dr. Shea's medical records which definitively establish the diagnosis date as being in 2002, at the same time Fortis obtained the handwritten office note on which it seeks to rely. The medical records Fortis admits receiving at the time it received the handwritten note included the physical examination for college dated May 18, 2001. The findings for that college physical do not reveal any HIV. Fortis had no billing claims in its possession related to diagnosis or treatment of HIV in 2001 or prior to May 14, 2002; following which it started receiving bills for both diagnosis and treatment thereof. Fortis had no medical record to match up with billing for May 14, 2002. Finally, there is evidence that Fortis would not have paid a bill if it was based on the same scant information set forth in the handwritten note.

In relying on Howard, supra, Defendant asserts that the only evidence of bad faith on its part came into existence after the date of its rescission on Sep-

tember 5, 2005. That assertion is incorrect. The court agrees with the holding in Howard, but that does not support Defendant's [23] position. There was overwhelming evidence of bad faith by Fortis at or prior to the September 5, 2002 recission letter, which raises a factual issue for the jury as to whether or not it was reasonable and in good faith for Fortis to rescind the Plaintiff's policy and deny his claims. Moreover, Defendant attempts to define the bad faith as occurring on September 5, 2002, when the letter notifying Plaintiff of the rescission was sent. However, evidence was presented upon which the jury could infer that the bad faith rescission was not complete until the second rescission committee review in June 2003 or later. Fortis' own witness testified that in rescission cases, an insured could appeal as many times as he wished, with no time limit, leaving an inference that Fortis itself considers no rescission final.[2]

It has long been the law of this state that in order to void a policy of insurance on the ground that fraudulent representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was know to the applicant, that they were material to the risk, were relied on by the insurer, and that they were made with intent to deceive and defraud the company. Lanham v. BlueCross and BlueShield of South Carolina Inc. 349 S.C. 356, 563 S.E. 2d 331 (2002). When Fortis rescinded and maintained the

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[2] There was no evidence presented, however, that Fortis' insureds are advised of this never-ending appeal process.

decision to rescind the Plaintiff's policy, it did not have clear and convincing evidence that the representations that Plaintiff made on the policy application were untrue, and Fortis had absolutely no evidence that the falsity was known to the applicant or that the representation was made with the intent to deceive or defraud the company.

Crossley, supra, also fails to support the Defendant's argument. In Crossley, State Farm [24] followed "standardized, published procedures to determine whether respondent's symptoms met criteria for denying coverage based on a pre-existing condition." There was no evidence in that case "to support respondent's claim that State Farm breached its implied covenant of good faith under the contract." Crossley v. State Farm Mut. Auto Ins. Co., 307 S.C. at 360, 415 S.E. 2d at 397. In contrast, Fortis had no written policies or procedures at all governing any step of the rescission process, and the record was replete with evidence of Fortis' bad faith prior to the time of rescission and maintaining the rescission.

Fortis also contends there is insufficient evidence of emotional distress damages. Fortis asserts that proof of a physical illness or bodily injury and proof of severe distress are required but absent. In contending that Plaintiff must prove a physical illness or other bodily injury and severe distress, Fortis relies on cases involving the tort of "outrage," or intentional infliction of emotional distress. Fortis ignores that this is a bad faith case, not a case alleging intentional infliction of emotional distress. The right to recover actual damages for emotional distress in a bad faith case was recognized in the case of University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp., 335 F.

Supp. 2d 702 (D. S.C. 2004). As the Court in that case recognized, the Fourth Circuit has implicitly held that emotional distress damages related to a bad faith action in South Carolina are recoverable when the distress was related to the refusal to pay benefits. State Farm Fire and Cas. Co. v. Barton, 897 F. 2d 729 (4th Cir. 1990).

Numerous cases from other jurisdictions recognize that emotional damages are recoverable as an element of actual damages in a bad faith case, without proof of injury, illness, [25] or severe distress. See, e.g., Ace v. Aetna Life Insurance Company, 139 F. 3d 1241 (9th Cir. 1998); Goodson v. American Standard Insurance Company of Wisconsin, 89 P. 3" 409 (Col. 2004); Ingalls v. Paul Revere Life Insurance Group, 561 N.W. 2d 273 (N.D. 1997); Hangarter v. Paul Revere Life Insurance Company, 236 F. Supp. 2d 1069 (Cal. 2002); State Farm Mut. Auto Ins. Co. v. Campbell, supra; Washington v. Group Hospitalization , Inc., 585 F. Supp. 517 (U.S. D. C. 1984); Bibault v. Hanover Insurance Company, 417 A. 2d 313 (RI. 1980); Tran v. State Farm Mut. Auto Ins. Co., 999 F. Supp. 1369 (D.Ha. 1998); and Patel v. United Fire and Cas. Co., 80 F. Supp. 2d 948 (N. D. Ind. 2004).

Policy considerations for requiring severity of emotional distress to be shown in the "outrage" context do not support applying that requirement in the bad faith context. The basic assumption underlying limits to the tort of outrage is that emotional distress without physical injury or illness may be relatively trivial and too easily asserted.

> In contrast, when an insurance company wrongfully refuses to honor its obligations, emotional distress is a natural and believable

> response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. Ace v. Aetna Life Insurance Company, supra, 139 F.3d at 1250.
>
> Given that insureds purchase insurance policies to obtain financial security and peace of mind, emotional distress is a likely and foreseeable result of a bad faith denial of the benefits afforded under the contract. The action of the insurer causing anxiety, stress, inconvenience, and financial risk to the insured by delaying payment owed under the policy contravenes a fundamental benefit of obtaining the insurance. Goodson v. American Standard Insurance Company of Wisconsin, supra, 89 P.3d at 417.

"[A]n unreasonable denial of insurance benefits—a necessary element of every bad faith breach [26] of insurance contract—can cause anxiety, fear, stress, and uncertainty, even when the benefits are eventually paid." Id.

> An insured purchases insurance in the first place so as not to suffer such anxiety, fear, stress, and uncertainty. The fact that an insurer finally pays in full does not erase the distress caused by the bad faith conduct. Damages for emotional distress the insured proves are therefore available in actions for bad faith breach of insurance contract upon the showing of the insurer's liability. Id.

"Because a primary consideration in purchasing insurance is the peace of mind and security it will pro-

vide, an insured may recover for any emotional distress resulting from an insurer's bad faith." Jarchow v. TransAmerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470, 486 (1975); Ingalls v. Paul Revere Life Insurance Group, supra, 561 N.W. 2d at 283.

Defendant also argues that there was insufficient evidence that plaintiff's emotional harm was caused by its bad faith, relying on the case of State Farm Fire and Cas. Co. v. Barton, supra. Barton was a bad faith case arising out of a loss of Plaintiff's home due to fire. The only evidence presented at trial of Barton's mental anguish demonstrated emotional distress due to the loss of his home, and did not address the emotional harm, if any, resulting from the bad faith actions of the insurer. Barton is factually distinguishable from the present case. In this case there was considerable testimony about the Plaintiff's mental distress and emotional anguish arising from the bad faith of Fortis. Fortis argues that the Plaintiff's fear, worry, embarrassment, indignation, collection notices and loss of sleep were caused by contracting HIV, not by the bad faith of Fortis. The court disagrees. The evidence from Plaintiff, Mary Wiggins, and Debra Poston made a clear distinction between emotional distress Plaintiff experienced from learning he had HIV and the separate and additional mental distress and emotional anguish he [27] experienced from (a) losing his insurance coverage; (b) anxiety about whether he could obtain treatment for HIV; (c) fearing the consequences of not being treated; (d) being embarrassed at having to go to a public HIV/AIDS clinic rather than his private physician; (e) being falsely accused of insurance fraud; and (f) being distressed about receiving collection letters from physicians whose bills he could not afford to pay in full, and which should have been

covered in substantial part by his insurance coverage.

Finally, Fortis' argument regarding emotional distress damages incorrectly assumes the jury's $150,000 (One hundred fifty thousand dollars) actual damage award was solely compensation for emotional harm. There was ample evidence presented from which the jury could have awarded Plaintiff compensation for damages other than emotional harm.

Fortis also asserts that there is insufficient evidence to sustain the jury's punitive damages award. Fortis relies on the unpublished Fourth Circuit opinion of Tadlock Painting Company vs. Maryland Cas. Co., 93-2021, 1996 WL 532745, at 3 (4th Cir., September 20, 1996), which held that the court should have granted JNOV on the punitive damages award because it found "no evidence in the record that could lead a reasonable juror to conclude" that Defendant acted willfully or recklessly in its bad faith handling of Plaintiff's claim. Tadlock Painting, as an unpublished decision of the Fourth Circuit, has little persuasive authority. More importantly, however, it is factually distinguishable from this case, where overwhelming evidence was presented that Defendant acted willfully and recklessly in its bad faith rescission of Plaintiff's policy. The investigation by Fortis stopped upon discovery of suspicious evidence, and there was no investigation about whether the suspicious evidence was accurate or reliable. Fortis failed to conduct a thorough; objective and fair investigation and instead latched [28] onto one piece of false evidence to try to justify rescission. There was evidence from which the jury could infer Fortis either knew the truth all along or did not want to discover the truth. There was absolutely no evidence that

Plaintiff knew his representation was false (which it was not) or that he intended to deceive Fortis when he answered that he had not been diagnosed or received treatment for an immune deficiency disorder, because his answer was true. The secrecy of Fortis' rescission panel shows a consciousness of wrongdoing and a desire to avoid accountability. There were no rules, no minutes, no notes, and, in accordance with instructions from general counsel, not even a record of who was present. There were more than forty other customers, whose cases appeared before the rescission committee for review in no more than one and one-half to two hours, representing an average of three minutes or less per customer. Fortis did not inform Plaintiff that he had appeal rights, and it did not inform him that his appeal must be in writing to be considered. Fortis engaged in selective documentation, recording and/or maintenance of records of telephone calls after rescission. Fortis shredded, deleted, and used other documents not intended to be microfilmed. Fortis failed to provide legible copies of the Addendum to the referral form authored by Kate Stephens, which contains critical information about her consciousness of wrongdoing. Fortis ignored Mary Wiggins' telephone call on behalf of Plaintiff and refused her offer to fax medical records which would prove the rescission was based on bad information. Fortis ignored Sallie Phelan's letter and the attached Labcorp report. Fortis' underwriting supervisors testified that, even knowing what they now know, they would rescind the policy again if they had the chance. Such evidence represents clear and convincing evidence of Fortis' recklessness and willfulness.

[29] "If an insurance company could not be subjected to punitive damages it could inten-

> tionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest would enable the insurer to pressure an insured to a point of desperation; enabling the insurer to force an inadequate settlement or avoid payment entirely." John S. Trimper v. Nationwide Insurance Company, 540 F. Supp. 1188 (D.S.C. 1982)
>
> "Unless it is held liable for such conduct, an insurance company can, with complete impunity, deny any claim it wishes, whether for valid reasons or not. The threat of punitive damages provides a suitable deterrent for willful withholding of benefits due under the contract." Brown v. South Carolina Insurance Company 284 S.C. 47, 324 S.E., 2d 641 (Ct. App. 1984)

Fortis argues that it was prejudiced by various procedural errors. The court disagrees. Fortis argues that it was error to allow post-rescission conduct to be admitted. However, in accordance with the case of Howard, supra, the court instructed the jury that such conduct was not probative of bad faith, but could only be considered for other purposes. Such evidence is probative of the willfulness and recklessness of Fortis as well as credibility of Fortis.

Moreover, there was a factual question presented as to when recission occurred. Defendant attempts to define the recission as occurring on September 5, 2002, when the letter notifying Plaintiff of the rescission was sent. However, evidence was presented

upon which the jury could infer that the bad faith rescission was not complete until the second rescission committee review in June 2003, or later.

Additionally, Fortis' key defense, that Plaintiff failed to mitigate his damages after [30] rescission, also undermines Fortis' position that the admission of post-rescission conduct was in error. By raising the failure to mitigate defense, Defendant opened the door to testimony from Plaintiff's witnesses regarding Plaintiff's efforts to have Fortis recognize the truth and reinstate the policy. Plaintiff is certainly permitted to offer evidence contrary to Defendant's mitigation defense. By arguing and attempting to prove failure to mitigate, certain aspects of Fortis' post- rescission conduct became relevant to the mitigation defense issues. It would be neither logical nor fair to allow Fortis to accuse Plaintiff of a failure to mitigate his damages and then preclude him from offering testimony to show his attempt to mitigate damages in trying repeatedly to convince Fortis its recission was based on erroneous information.

Fortis argues that the court improperly allowed evidence (a) of Fortis' actions with regard to "forty-five other insureds on the same day that Plaintiff's policy was rescinded;" (b) that the "corporate atmosphere" encouraged rescissions without thorough investigation; and (c) regarding post-claim underwriting. In reviewing those evidentiary decisions, the court sees no error. With regard to the evidence of forty-five other insureds' policies being reviewed on the same day that Claimant's policy was rescinded, that was probative of recklessness and willfulness in showing how little time the rescission committee allocated to consideration of each policy. Reference to those other policies reviewed during the same meet-

ing when Plaintiff's policy was rescinded has a clear and substantial nexus with the damage to the Plaintiff in this case. The court in State Farm vs. Campbell, supra, expressly recognized the appropriateness of such evidence: Even if Fortis' actions on those other policies were lawful under the law of other states, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the Defendant's action in the State where it is [31] tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 422, 123 S. Ct. at 1522.

Testimony from Plaintiff's insurance bad faith experts about the corporate atmosphere encouraging rescission and discouraging thorough investigations was also properly admitted because it is probative of bad faith, as well as willfulness and recklessness. It has an obvious nexus with the harm suffered by plaintiff. Also, one of the Gamble factors to be considered in a punitive damages review and one indication of reprehensibility under Gore and State Farm v. Campbell is whether there has been prior similar conduct. This evidence was probative of prior similar misconduct by Fortis, and was properly admitted.

As to Defendant's claim about evidence of post-claim underwriting, it is not necessary in this case to determine whether post-claim underwriting, in certain circumstances, may be proper. That is because Fortis, in this case, clearly used post-claim underwriting in bad faith. The evidence shows that Fortis commenced a fraud investigation not because of discovering anything suspicious about Plaintiff, but because Plaintiff contracted HIV. Fortis then stopped the investigation when it found one snippet of false

and unreliable information, taken out of context, on which it claimed a right to rely. In this case, if Fortis had investigated Plaintiff's medical records in existence at the time of his application, those medical records in existence would have confirmed the truthfulness of Claimant's representations about no diagnosis or treatment for immune deficiency disorder. "Normally, a layperson who pays his premium at the time an application for insurance is filed is justified in assuming that payment will bring immediate protection." Crossley v. State Farm Mutual Automobile Insurance Company, supra. Fortis rescinded Plaintiff's policy without conducting a fair, objective and [32] thorough investigation. Evidence of such bad faith post-claim underwriting was properly admitted.

Defendant also argues that the value of Plaintiff's gratuitous medical care should not have been admitted. The court disagrees. It was properly admitted as evidence of the value of claims that would have been submitted during the rescission period, which is relevant to actual damages. "The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services." Haselden, as Personal Representative of Hill v. Davis, 353 S.C. 481, 579 S.E. 2d 293, (2003). The value of those services is also relevant to the recklessness and willfulness of Fortis. The case of State Farm vs. Barton, supra, recognizes that an insurer's economic incentive or motive to deal in bad faith with its customer is probative of willfulness and recklessness. In this case, the value of Plaintiff's gratuitous care during the rescission period, plus the minimum value of expected future medical treatment for HIV over the remainder of Plaintiff's life expectancy did provide evidence of

the economic incentive and motive of Fortis to avoid substantial claims of approximately $1,080,000.00 (One million, eighty thousand dollars) related to HIV treatment alone. Plaintiff did not argue that Fortis would have had to pay the entire amount of those claims under the policy. To the contrary, Plaintiff acknowledged that there were substantial co-payment obligations. Despite substantial co-pays, however, the evidence of the minimal value of future medical care was relevant to the economic incentive of Fortis to avoid large claims by rescinding Plaintiff's policy.

Fortis also argues that testimony from Dr. Htay about the deleterious effects to Plaintiff from receiving no treatment for his HIV was irrelevant. The court disagrees. It was obviously [33] relevant to both actual and punitive damages. As to actual damages, it proved the beneficial effect of Plaintiff's actions to mitigate his damages by seeking and obtaining free medical care. As to punitive damages, it is relevant to the Plaintiff's vulnerability, the culpability and reprehensibility of Fortis' misconduct, the potential harm flowing from Fortis' misconduct, and the fact that Fortis' misconduct had ill effects not only on Plaintiff's economic interests but also threatened his health and life.

Fortis also argues that Professor John Freeman should have not been allowed to testify. The court disagrees. It contends he was a surprise witness not identified as an expert in response to Interrogatories. Although he was not formally identified, the court finds it came as no surprise to Defendant for Professor Freeman to be offered as an expert in the Rebuttal portion of Plaintiff's case. Early in litigation, Fortis made a Motion to Disqualify Plaintiff's Counsel

on the grounds that they had engaged in allegedly unethical conduct by "setting up" Fortis for bad faith by not including additional medical records as an enclosure to the demand letter from Sallie Phelan. In connection with that Motion hearing, Plaintiff filed and served an affidavit from Professor Freeman which both defended and commended the actions of Plaintiff's counsel. That Motion was denied. Just before trial Plaintiff made a Motion In Limine seeking to preclude Defendant from offering evidence that the Plaintiff's attorneys had acted unethically or improperly in any respect. Although the court had reservations about the questionable probative value and potential prejudice of such evidence, the court denied that Motion, in an effort to allow Fortis a full and wide-ranging opportunity to mount a defense. The primary witness used by Fortis to accuse Plaintiff's counsel of "setting up" Fortis for bad faith was Mr. Tom Hesse, an attorney and former insurance adjuster from Charleston. Fortis did not [34] identify Mr. Hesse as an expert in this case until just a couple of weeks before trial. When Fortis identified Mr. Hesse as an expert, it did not specify whether he would be testifying as an insurance expert only, or also as a legal expert about the conduct of Plaintiff's counsel. Mr. Hesse was made available to be deposed just days before trial. He was asked questions about Professor Freeman's affidavit, which he had read. When the court had a pre-trial conference with the attorneys on Friday afternoon before trial started, Plaintiff's counsel requested clarification as to whether or not the court would allow the defense to use Mr. Hesse as a legal expert to criticize the actions of Plaintiff's counsel. The court inquired of Fortis' counsel whether they intended to do so, and they denied any attempt to use Mr. Hesse as a legal

expert to challenge the ethical conduct of Plaintiff's counsel, but indicated they would ask Mr. Hesse whether he thought Plaintiff's counsel should have sent Fortis all of the medical records they had obtained, at the time Sallie Phelan sent her demand letter. When Fortis called Mr. Hesse as a witness during trial, Fortis' counsel went to great lengths to establish his credentials not only as an insurance expert, but also as an attorney with the specific experience of handling bad faith cases for both the Plaintiff and the insurance company. He criticized the failure of Plaintiff's counsel in June, 2003, to send Fortis all the medical records they had obtained. Mr. Hesse admitted on cross-examination that he had not even read the records which he contended should have been sent to Fortis and could not articulate how they could have possibly made a difference to Fortis' decisions about rescission. Yet, Mr. Hesse insisted that to send such records "couldn't have hurt anything", and the failure to send them showed Plaintiff's counsel did not really want reinstatement of plaintiff s policy, just a bad faith lawsuit. For these reasons, the court is convinced that Plaintiff was not in a position to make a decision about whether they would need [35] Professor Freeman as a witness until the pre-trial conference, at the very earliest, or more likely, not until Mr. Hesse testified during trial. Plaintiff tried repeatedly to keep out of evidence any matter relating to the conduct of Plaintiff's counsel, and it was Fortis that insisted on offering evidence supporting that line of defense. Once the court allowed Fortis through Mr. Hesse to criticize the actions and motivation of Plaintiff's counsel, in fairness, the court decided Plaintiff should be allowed to call Professor Freeman as a reply expert. The court offered Fortis an opportunity for its attorneys to

meet with Professor Freeman prior to his testimony, to ask him any questions they might have. They took advantage of that opportunity. Additionally, since September, 2004, Fortis and its counsel had been in possession and knew the contents of Professor Freeman's affidavit submitted during the earlier Motion hearing. The court is satisfied that allowing Professor Freeman to testify was the correct decision, and that Fortis was not surprised by his testimony or prejudiced in any way. His testimony was not a surprise or deviation from the contents of his affidavit. It would be particularly unfair and prejudicial to preclude Plaintiff from calling Professor Freeman as a rebuttal witness where Defendant waited so long to identify Mr. Hesse as a witness, and that Defendant was not informed as to the scope of Mr. Hesse's testimony prior to the pre-trial conference.

Fortis next argues that the court allowed unqualified experts to testify for the Plaintiff. The court disagrees. The insurance experts testifying for Plaintiff included Mr. Robert Hall and Mr. James Sadler. Both had many years of experience in the insurance field, dealing with the rescission of policies and bad faith issues. Although Mr. Hall's experience with the health insurance industry was outside the state of South Carolina, the court found him to be well qualified to testify on the subjects he addressed in his testimony. Although Mr. Sadler's [36] experience was primarily in property and casualty insurance, and less on the health insurance side, the court also found him to be well qualified concerning the subjects covered in his testimony. Bad faith rescission is not limited to one particular field of insurance. Insurance statutes in South Carolina which address unfair insurance practices make no distinction between health insurance and property and ca-

sualty insurance. Any perceived deficiency in the knowledge or experience of Plaintiff's experts about health insurance in South Carolina goes to the weight that should be accorded their testimony, and not to the admissibility thereof.

Fortis also complains about the evidence of its net worth and other financial information. Ability to pay punitive damages is one of the Gamble factors this court is directed to consider in the review of any punitive damages award. The evidence of Fortis' net worth and other financial information introduced through Dr. Oliver Wood is probative of Fortis' ability to pay a punitive damages award. Moreover, absent knowledge of the Defendant's financial status, a jury would not know how much punitive damages would be needed to deter Fortis from repeating its misconduct in the future. The type of evidence introduced regarding Fortis' financial status is virtually identical to that approved by our appellate courts in the cases of Cock-N-Bull Steak House, Inc., supra; and Orangeburg Sausage Co., supra.

Fortis also argues it was prejudiced by not being allowed to introduce the portion of the demand letter from Sallie Phelan which contained a monetary demand. Fortis argues that the amount of the settlement proposal is probative of Plaintiff's alleged failure to mitigate damages. I disagree. The court finds that the monetary demand is not probative of an alleged failure to mitigate damages. The court also finds that Plaintiff's counsel had absolutely no duty to provide Fortis with the fruits of their investigation prior to litigation. Fortis itself had the duty in good [37] faith to fairly, objectively and thoroughly investigate Plaintiff's representations and his intent before rescinding his policy on the basis of alleged mi-

srepresentation. The court agrees that Plaintiff had a duty to mitigate his damages, and the court finds he did. Both directly and through agents, he tried to convince Fortis of its mistake. But for Plaintiff's taking steps to obtain free medical care through Hope Health, his HIV would have become AIDS, and he would now be deceased. Rule 408 of the South Carolina Rules of Evidence directs that "evidence of conduct or statements made in compromise negotiations is likewise not admissible." While the language of the rule does permit exceptions when such evidence is offered for a valid purpose, my decision to exclude such evidence in this case was proper. Such evidence had no probative value, or if it had any possible probative value, which the court does not see, it was ever so slight and clearly outweighed by its potential for prejudice or confusion. Its admission could also have a chilling effect on parties' good faith attempts to resolve disputes before filing a lawsuit.

Fortis also complains about my decision to charge the jury on spoliation. Fortis asserts there was no evidence that Fortis destroyed any evidence, but the court disagrees. The record was replete with evidence of Fortis' desire for secrecy, concealment, shredded documents, deleted documents, missing entries on phone logs and recordings. It would have been reversible error for me not to give a spoliation charge. Stokes v. Spartanburg Regional Medical Center, 2006 WL 3692613 (S.C. App. 2006).

Fortis seeks JNOV based on its arguments reviewed in detail above. As the court is not persuaded by any of these arguments, the court denies that Motion.

Fortis also seeks a new trial absolute, arguing that the jury's verdict resulted from [38] passion,

prejudice or caprice. The court disagrees, and deny that Motion also. As mentioned above, the court finds there was ample justification for the jury's verdict both as to actual damages and as to punitive damages.

Fortis also seeks in the alternative a new trial nisi remittitur. Such is proper if the trial judge finds the jury was unduly liberal in its award of actual and/or punitive damages. For the reasons set forth above, the court finds that the jury award was not excessive or unduly liberal, but was proper, reasonable, and well justified by the evidence. The court therefore also denies the Motion for New Trial Nisi Remittitur.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as to the Defendant's Motion to Require Plaintiff to Elect Remedies, Plaintiff has elected to retain the award of actual and punitive damages in the bad faith cause of action; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant's other post-trial Motions shall be, and they hereby are DENIED.

AND IT IS SO ORDERED, this 19 day of July, 2006.

[signed]

The Honorable Michael G. Nettles
Presiding Judge

APPENDIX C

[Order of the Supreme Court of South Carolina, denying petition for rehearing (December 17, 2009)]

The Supreme Court of South Carolina

December 17, 2009

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Re: Mitchell, Jerome v. Fortis Insurance Co.

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

December 17, 2009."

Also, enclosed is order issued by the Court denying the Motion to Stay the Issuance of Remittitur Pending Review in the United States Supreme Court.

The remittitur is today being forwarded to the lower court.

Very truly yours,

[signed]

CLERK

DES/jjp

cc: Stephan I. Voudris, Esquire
Edward L. Graham, Esquire
Brian D. Phelan, Esquire
Sallie P. Phelan, Esquire
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Supreme Court, U.S.
FILED
FEB 19 2010
OFFICE OF THE CLERK

NO. 09-854

IN THE

Supreme Court of the United States

FORTIS INSURANCE CO.,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the jury was presented with and considered evidence of potential harm, plaintiff argued that potential harm should be considered in assessing punitive damages, defendant requested no limiting instruction, and the trial court used potential harm in reviewing the jury's punitive verdict, whether the South Carolina Supreme Court deprived petitioner of procedural due process by justifying a remitted punitive damage award on the basis of a *smaller* potential harm figure.

2. Whether a punitive damage award for egregious misconduct held to merit punitive damages at the "outer limits of the single-digit ratio" is unconstitutionally excessive.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Jerome Mitchell, Jr., respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the South Carolina Supreme Court in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner Fortis Insurance Company portrays the facts of this case in a manner that disparages its underlying liability—liability not contested in any question presented—in order to obtain relief from punitive damages. The portrayal is at odds with the opinion of the South Carolina Supreme Court below and the order of the trial court, both of which support the jury's findings, findings that are not subject to reexamination in this Court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 n.12 (2001).

A. The Facts as Described by the South Carolina Supreme Court in the Course of Remitting the Punitive Damages Award

Respondent Jerome Mitchell, Jr., was seventeen, college-bound, and no longer covered by his mother's policy when he applied for health insurance from Petitioner Fortis Insurance Company, in May 2001. Pet. App. 2a. The application asked: "Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" *Id.* Answering honestly, Mitchell said "no." *Id.* Fortis, after reviewing the application, issued him an insurance policy. *Id.*

About a year later, in April 2002, Mitchell tried to donate blood at the American Red Cross. Pet. App. 3a. On May 13, 2002, the Red Cross informed Mitchell that his blood had screened positive for HIV and suggested that he confirm their test results with his personal physician. Mitchell sought confirmation the next day, on May 14, 2002, when he visited Dr. Michael Chandler. *Id.* Dr. Chandler's tests confirmed Mitchell's HIV-positive status. An assistant to Dr. Chandler made the following notation on Mitchell's chart during the *May 14, 2002* visit: "Gave blood in March—got letter yesterday stating blood tested [positive for] HIV." *Id.* A handwritten note on the chart indicated, correctly, that Mitchell was eighteen years old, but erroneously misstated the year of the visit as May 14, 2001. *Id.*

Upon Dr. Chandler's referral, Mitchell subsequently visited Dr. Kevin Shea, an infectious disease specialist, on May 23, 2002. *Id.* Dr. Shea recorded Mitchell's medical history, as follows: "Mitchell is an 18 year old African-American male with no past medical history who apparently tried to donate blood in April of this year [and] was noted to be HIV positive." *Id.*

When Fortis received claims for Mitchell's treatment and testing from Drs. Chandler and Shea, it launched an investigation to determine whether Mitchell had failed to disclose a pre-existing condition on his policy application.[1] *Id.* Mitchell

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[1] The Fortis investigation was triggered by a computer program that identifies high-cost treatments, not because of "anything suspicious in the application or based upon any actions of the insured." Pet. App. 41a.

cooperated with the investigation, agreeing to release medical records and to identify his healthcare providers. Pet. App. 4a.

Focusing solely on an erroneously dated intake note, as her written summary made clear, Fortis Senior Underwriter Kate Stephens recommended that Mitchell's insurance policy be rescinded on the ground that he had misrepresented his HIV status at the time of his application. *Id.* An addendum to the referral summary, added shortly thereafter, likely by Stephens,[2] inquired openly about what rationale might best support rescission of Mitchell's health insurance policy, given the absence of clear evidence that Mitchell had made any misrepresentation about his prior health status: "Can't use the question re: AIDS as he does not have AIDS, he has tested positive for the HIV virus. This is the only question I've found that we can use—any other suggestions?" *Id.* The note added: "we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?" *Id.* at 5a.

Testimony by Mitchell's insurance expert at trial established that it was Fortis's practice to shut down an investigation once a single piece of evidence was discovered that would support rescission. *Id.* at 6a-

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[2] The trial court noted that this document was "originally produced to Plaintiff's counsel in a completely illegible form." Pet. App. 40a. Repeated discovery requests only produced "marginally better copies." *Id.* When a "clear and legible" copy was finally produced, Fortis's employee stated it took her ten minutes or less to obtain from microfilm stored steps from her office. *Id.*

7a. An insurance expert called by Fortis conceded on cross-examination that an insurance company had a duty to investigate and find information that may lead to *payment* of a claim, *id.* at 7a, but Stephens' supervisor was unable to answer whether any employee had the responsibility for carrying out that responsibility of finding out the truth about a policyholder's medical condition. *Id.* Yet, an employee in Dr. Shea's office testified that it took her "five minutes" to verify the correct date on the erroneously dated intake form that prompted Fortis's rescission. *Id.* at 7a n.5.

Shortly thereafter, in the course of a two-hour meeting in which it reviewed 45 other rescission recommendations, Fortis's rescission committee voted to rescind Mitchell's policy, *id.* at 5a, on what "was likely no more than a three-minute review." *Id.* at 8a. The following day, Fortis sent Mitchell a letter informing him of his policy's rescission and welcom[ing] any information you may have which would effect [sic] our decision to rescind your policy." *Id.* Mitchell immediately contacted Fortis, insisting that he had not misrepresented his health status in his application and asked to speak to Stephens. He was instead directed to a customer service representative who answered that there was "nothing [the representative] could do" about the rescission. *Id.* at 5a. No information was provided to Mitchell about any right to appeal the rescission. *Id.* at 6a.

Suddenly without health insurance, Mitchell sought the help of a case manager at the Hope Health free medical clinic. That case manager, too, contacted Stephens to inform her that medical

records in the case manager's possession confirmed that Mitchell first tested HIV positive well after purchasing health insurance and offered to fax or mail records confirming the timing. Stephens, in response, refused to accept any records, stating "there was nothing she could do at this time." *Id.* at 5a-6a.

Mitchell retained an attorney who, on June 4, 2003, sent Fortis a copy of Dr. Chandler's initial test results accompanied by a letter informing Fortis that Mitchell was first diagnosed with HIV in May 2002—not 2001. *Id.* at 6a. The following week, Fortis responded that it would review his "appeal." *Id.* When the rescission committee reconvened, the information before the committee consisted of a single notation: "letter from attorney stating that the insured did not misrep[resent] coverage since the first diagnosis of AIDS was 5/14/2002." *Id.* The committee denied Mitchell's appeal and upheld the rescission. *Id.*

At trial, a medical expert testified that without medical treatment, Mitchell would contract AIDS within two years and likely die two years after that. *Id.* at 8a. A health care expert testified about the minimum expected costs that it would take to care for Mitchell throughout his life, not including complications from HIV and AIDS. An economist, based on the health care expert's figures, projected a total present value of $1,081,189.40 for Mitchell's treatment and costs. *Id.*

The jury returned a verdict in Mitchell's favor on the breach-of-contract claim and the bad-faith-rescission claim for $36,000 and $150,000, respectively. Between the two, Mitchell elected the

bad-faith remedy. The jury also awarded $15 million in punitive damages for the bad-faith claim. *Id.*

The trial court, in its post-judgment review, considered but rejected Fortis's argument that the punitive damages award violated due process.

On appeal, the South Carolina Supreme Court affirmed the jury's finding of liability on bad faith and affirmed the compensatory damages award. The Court held that it was "patently clear from the record that there is no support for Fortis's claim that 'the evidence as a whole is susceptible to only one reasonable inference' that Fortis was not liable for bad faith." *Id.* at 28a.

After engaging in *de novo* review and employing the three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the aggravating factors and ratio analysis discussed further in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the court concluded that Fortis's misconduct "was reprehensible enough to merit an award towards the outer limits of the single-digit ratio" and remitted the $15 million punitive damages award to $10 million, resulting in a ratio of 9.2 to 1. *Id.* at 24a.

In arriving at this conclusion, the court recognized that Mitchell's harm was not only economic, but also physical because "the termination of his health insurance policy [ ] exposed him to great risk of physical danger." Pet. App. 18a. Moreover, Fortis exhibited a deliberate indifference to Mitchell's health and well-being, as its conduct would have "deprived Mitchell of health insurance for at least three years, during which time his health

would have surely deteriorated." *Id.* at 15a. It further found that Fortis's actions were motivated by greed—that is, the desire to boost its own profit by not having to support an HIV patient's costly medical treatment. *Id.* As Fortis knew, Mitchell was a young adult about to enter college, facing tremendous medical expenses, and was therefore financially vulnerable. *Id.* at 19a.

The court further concluded that the acts of deliberate indifference were repeated for more than two years. *Id.* The evidence supported a "finding that the harm Mitchell suffered was a result of intentional deceit." *Id.* In fact, it reflected corporate policy because Fortis had no written rescission policies, did not provide information about appeal rights or procedures, maintained a separate retention policy for rescission documents, appeared to doctor evidence by omitting the case manager's call from Stephens's phone log, and likely "was in possession of Dr. Shea's records as early as the summer of 2002." *Id.* at 19a-20a.

B. The Facts Misstated by Fortis in Its Petition

Fortis, in its petition, misstates key facts and omits others in a bid to draw into question the jury's finding of bad faith as it relates to the award of punitive damages, which Fortis claims is unconstitutionally excessive. For instance, Fortis asserts, "It was not until *after* Mitchell filed suit that Fortis learned that the date of the medical record was in error." Pet. 1 (emphasis added). As the South Carolina Supreme Court's review of the record, summarized above, demonstrates, Fortis had the

information readily available in its own files,[3] had ample means to confirm the correct date but chose not to undertake that task even though it had a duty to so, and refused to receive or examine documentation from Mitchell, his physicians, his health-care claims manager, or his attorney that would have enabled Fortis to determine the correct date. *See* Pet. App. 4a-6a, 19a. Instead, "Fortis reinstated Mitchell's policy nearly twenty months after it had been put on notice that the evidence upon which it relied was erroneous. " *Id.* at 19a.[4] In that intervening period of time, Fortis took steps to hide its misconduct and intentionally deceived Mitchell, in order to deny him coverage. *Id.* (describing evidence of Fortis's deceitful conduct). Fortis's bald assertion in its petition, then, that it

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[3] The trial court noted that, in addition to other indications that Fortis "acted unreasonably in rescinding the policy," an "inference may also be drawn that Fortis had the May 14, 2002 LabCorp report and Dr. Shea's medical records which definitively establish the diagnosis date as being in 2002, at the same time Fortis obtained the handwritten note on which it seeks to rely." Pet. App. 52a. In addition, and very telling, Fortis had no billing claims for diagnosis or treatment of HIV before May 14, 2002. *Id.*

[4] Even then, the policy was not really reinstated, as Mitchell learned when he tried to use it at a drugstore and learned that the policy benefits were not available to him. App. 18a (Order at 15). Mitchell remained at Hope Health for treatment because personnel there decided it would be best, especially because there was no assurance that Fortis would stand by their reinstatement. R. 660, 662.

was not aware of this so-called error until "after Mitchell filed suit" is at odds with the record.

Fortis also calls the rescission "temporary" because it eventually reinstated Mitchell's policy. That characterization is absurd. Fortis rebuffed all efforts to correct its error and had no appellate procedures. *Id.* It did not reinstate Mitchell's policy until "well after the litigation had begun." *Id.* at 6a n.4. Moreover, Fortis never considers any rescission final, permitting, without informing policyholders, repeated appeals. *Id.* at 53a & 53a n.2 (calling it a "never-ending appeal process."). Thus, it is able to characterize all rescissions as less than final. Yet, the trial court below found that Fortis intended for the rescission to be permanent. App. 6a (Order at 5) (finding that Fortis attempted to rescind the policy "in perpetuity"). The rescission was only "temporary" because Mitchell filed suit against Fortis, and even then the litigation continued for almost a year before Fortis reinstated the policy, leaving Mitchell, a financially vulnerable young adult, without health insurance, and placing his health in jeopardy at a time when he desperately needed medical care. *Id.* at 19a (finding that the "rescission committee decided to reject Mitchell's appeal even after his attorney contacted Fortis to emphasize that Mitchell had not misrepresented his condition at the time he applied for the policy").

Fortis also states that it was surprised that potential harm was considered by the South Carolina Supreme Court in its *de novo* review of the punitive damages and thus had no opportunity to submit evidence or argue that issue. Pet. 14. Yet, Fortis did not counter the evidence of potential harm that was

introduced, R. 238-40, asked for no limiting instruction after Mitchell in closing tied punitive damages to potential harm, R. 1532-33, and was well aware that the trial court relied on potential harm in its post-trial review. Pet. App. 35a, 47a-49a; App. 11a-12a (Order at 9) ("Plaintiff's potential harm from rescission of his policy includes much more than the loss of health insurance coverage for the $1,000,000 (One million dollars) present value estimate for treating HIV."). There was no surprise and ample basis for the South Carolina Supreme Court to rely on potential harm.

The South Carolina Supreme Court's decision to remit punitive damages, and its conclusion that the remitted award satisfies due process and "vindicate[s] the twin purposes of punishment and deterrence," was based on the fact that "Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing punitive damages." Pet. App. 24a. The court itself acknowledged that, "[i]n assessing this remittitur, we place great emphasis upon" the reprehensibility of Fortis's conduct. Given the centrality of these facts to the questions sought to be presented for review, the only "post hoc rationalization[ ]" that merits "round[ ] condemn[ation]" (Pet. 18) are Fortis's factual misstatements, which are geared towards making its bad-faith conduct seem less reprehensible, or perhaps even excusable, so that this constitutionally reasonable award may somehow be made to appear excessive—which it is not.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of the traditional bases for this Court's review. *See* Sup. Ct. R. 10. It massively revises the factual record of the case, rendering it a particularly poor vehicle for the exercise of this Court's discretion. It fails to present any important federal question on which the lower courts are in conflict, or about which they may be fairly said to be confused. This is true in regards to both questions presented: that is, (1) whether post-judgment consideration of potential harm during due process excessiveness review violates due process (a question that, in any event, is not properly presented by this case); and (2) whether the meticulous application of this Court's well-established punitive damages guideposts to the particular facts of this case was in error. Thus, the petition should be denied.

I. Petitioner's Denial of Facts Found by the Courts Below Fail to Advise This Court of the Full Depth of Its Misconduct and the Extent to Which Those Actions Were Compounded by Litigation Misconduct

Courts do not lightly conclude that particular acts of misconduct fall at the extreme end of the reprehensibility scale. If anything, members of the judiciary have seen a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than shocked by new instances of egregious misconduct that may come before them. In colloquial language, they are likely to have "seen it all."

When the trial judge and a unanimous panel of the South Carolina Supreme Court conclude that the record reflects misconduct egregious enough to merit a significant punitive damages award, those courts' determinations should be credited as both earnestly made and reflective of the actual record. Judicial statements of the record ought to be treated as more credible than disparagements of losing parties, who conveniently elide over the parts of the record that are at odds with the fable they seek to concoct.

Yet, Fortis's statement of the case ignores the jury's determination of facts, the *de novo* review of the record rendered by the trial court judge who sat through the same presentation of the evidence as the jury, and the further *de novo* review of the South Carolina Supreme Court. Based on Fortis's version, one would question whether Fortis Insurance did anything wrong that might have merited liability, let alone punitive damages. Yet, the South Carolina Supreme Court found false both Fortis's continuing pleas that they engaged in a "'good act' of reinstatement following the 'temporary' rescission" and Fortis's repeated attempts to claim that "Mitchell himself acted negligently in failing to submit additional information prior to March 8, 2004." Pet. App. 26a. The trial court was similarly "struck by what a callous attitude Fortis exhibited toward the Plaintiff." *Id.* at 44a (noting also that "they investigated him for fraud because he contracted HIV"). Instead of displaying any remorse, Fortis treated its belated reinstatement at trial "as though it deserved to be applauded for a generous offer." *Id.* at 44a. It portrayed itself as a good corporate citizen in offering to pay past medical expenses, knowing that he did not accrue expenses at

the free clinic, but when faced with the value of those treatments denied any legal obligation to compensate Mitchell, leading the trial judge to observe that the "juxtaposition exemplifies Fortis's insincerity and failure to acknowledge the grave consequences of its misconduct." *Id.* at 44a-45a.

Fortis compounded its misconduct toward Mitchell by litigation misconduct. The trial judge found the record "replete with evidence of Fortis' desire for secrecy, concealment, shredded documents, deleted documents, missing entries on phone logs and recordings." *Id.* at 69a. The South Carolina Supreme Court found that such evidence was properly admitted. *Id.* at 26a.

Given that Fortis has not given an accurate account of the record, that the record reveals a company that resisted correcting error at the great expense of Mitchell's health, that it engaged in misconduct to avoid liability, that potential harm was presented to the jury, that Fortis requested no limiting instruction, that the trial judge considered potential harm and that Fortis assigned no error to that consideration, and that Fortis continues to act in denial of its misconduct, this Petition provides a poor vehicle for review of any conflicts that might exist over review of punitive damage awards and the award approved by the South Carolina Supreme Court should stand to serve its purpose of punishment and deterrence.

II. This Case Is Not a Suitable Vehicle for Considering Whether Post-Judgment Consideration of Potential Harm Violates Due Process

Fortis suggests that since *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993) (plurality opinion), whether (or when) potential harm may be considered as part of due process excessiveness review, if not considered by the jury in awarding punitive damages, remains to be decided. Pet. 12. The statement overstates any open question and ignores this Court's recent guidance that potential harm is a permissible consideration as long as "the potential harm at issue was harm potentially caused the plaintiff." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

Yet, even to the extent that a reviewing court's authority to consider potential harm may still be uncertain, this Petition is not a suitable vehicle for considering that question, for two reasons: first, the jury was presented with and considered the potential future medical expenses (*i.e.*, potential-harm evidence) that the courts below considered in reviewing the alleged excessiveness of the punitive damages; and second, Fortis did not press that issue nor did the South Carolina Supreme Court pass upon it below.

A. In this Case the Jury Was Presented with Evidence of Potential Harm, and It Considered Potential Harm in Assessing Punitive Damages

The first question in the Petition rests on an unsupported—and unsupportable—factual premise:

that the jury in this case was not presented with evidence of potential harm and did not consider this evidence in assessing punitive damages. Fortis argues that evidence of potential harm was introduced solely for purposes of establishing liability for bad faith, but not for actual and punitive damages. *See* Pet. 14. Specifically, it argues that evidence of potential future medical expenses, in the amount of the $1,081,189.40, was relevant only to motive, but not to punitive damages, and that it had no idea it was relevant to punitive damages or that the jury would consider it for that purpose. *See id.* This evidence, it claims, was first considered by the South Carolina Supreme Court in the course of remitting the award. The lack of meaningful notice that this evidence would be admitted and considered for this purpose, according to Fortis, violates procedural due process. These factual predicates are demonstrably false.

At trial, evidence of future medical expenses, in the amount of $1,081,189.40, was admitted, the trial court explained, "because it is probative of bad faith, as well as willfulness and recklessness." Pet. App. 62a; *see also id.* at 63a (finding that evidence of the value of claims that would have been submitted during the rescission period was properly admitted and was relevant to actual damages and "is also relevant to recklessness and willfulness"); *id.* at 64a (finding that "testimony from Dr. Htay about the deleterious effects to Plaintiff from receiving for his HIV . . . was relevant to both actual and punitive damages."). In South Carolina, the law has long recognized the propriety of awarding punitive damages for willful and reckless misconduct. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 450

S.E.2d 582, 586 (S.C. 1994) (punitive damages recoverable if conduct is shown to be willful and reckless).

Here, the potential-harm figure was the product of testimony by an economist and a health expert concerning both the physical and economic harm likely to result from Fortis's successful rescission of Mitchell's insurance contract. Pet. App. 8a. The South Carolina Supreme Court, moreover, sustained these evidentiary rulings. *Id.* at 27a ("Evidence of the risk Mitchell faced without health insurance coverage is properly admissible to establish Fortis's reprehensibility and support an award for punitive damages.").

Accordingly, Fortis was well aware that evidence of potential future medical expenses was admitted as potential-harm evidence for purposes of calculating punitive damages. In fact, it objected during trial to the admission of such evidence; it objected post-judgment to its consideration on the theory that it was irrelevant for any purpose, *see* Pet. App. 64a (rejecting that argument and concluding it was relevant to both actual and punitive damages); and, on appeal to the state supreme court, it assigned error based on its admission, not solely because it was irrelevant (in its view) to bad-faith motive, but also because it was irrelevant (according to Fortis) to the calculation of actual and punitive damages. Fortis Final Br. 37, S.C. Sup. Ct. (No. 2003-CP-21-1347) ("Even if the evidence had some marginal relevance, given its highly speculative nature, the admission was erroneous because the prejudicial effect of inflaming the jury to award a large punitive award greatly outweighed any probative value.").

Fortis, which did not seek any limiting jury instruction for the consideration of that evidence for some purposes but not others, simply has no basis to say that the jury's award for punitive damages was not partially predicated on this evidence, particularly given that courts presume that juries consider all the evidence presented to them. *See Schlup v. Delo*, 513 U.S. 298, 329 (1995) ("It must be presumed that a reasonable juror would consider fairly all of the evidence presented.").

Contrary to Fortis's argument, this case, therefore, is not comparable to *Lankford v. Idaho*, 500 U.S. 110 (1991), in which a criminal defendant's due-process rights were violated because he had no notice that the trial judge was considering the death penalty at sentencing. *See* Pet. 16. Unlike *Lankford*, Fortis had meaningful notice and the adversarial process in this case worked properly, as evidenced by the fact that Fortis repeatedly objected to the admission of potential-harm evidence and cross-examined Mitchell's experts who testified about potential harm. Fortis, of course, knew that Mitchell was seeking punitive damages well before trial (the complaint noted this), and knew, based on this Court's punitive damages jurisprudence, that potential-harm evidence is admissible to demonstrate that such damages are warranted.

Mitchell specifically argued that punitive damages were available to take away Fortis's incentive to avoid paying $1.004 million in medical management costs, potential harms that Mitchell faced. R. 1532-33. Moreover, the trial court specifically considered various potential harms in evaluating whether the jury's verdict was excessive.

Pet. App. 47a-49a. Though the trial court analyzed the potential harm in terms of the $6 million lifetime value of the policy, it explicitly acknowledged that Fortis had engaged in bad faith "in an attempt to avoid costly medical treatment claims when facing the potential costs of a projected lifetime medical treatment plan of $1,080,000.00 and policy limits of $6,000,000.00." *Id.* at 51a. It did so to justify the size of the punitive damage award, which it held otherwise would not accomplish its legitimate purposes. Thus, given that the jury itself heard and considered this evidence in assessing punitive damages and that the trial court had specifically considered the same figure of potential harm in justifying the punitive damages, Fortis has no basis to claim that it lacked meaningful notice that the South Carolina Supreme Court would consider this same evidence during its post-judgment review.

B. This Issue Was Neither Pressed Nor Passed Upon Below

Fortis did not raise any procedural due process issue in its appeal to the South Carolina Supreme Court, and the court, understandably, did not pass on it. *See* Pet. App. 9a. The procedural history of this case makes plain that the lack-of-meaningful-notice issue could have and indeed should have been raised in the appeal to the South Carolina Supreme Court because potential harm was the basis of the trial court's approval of punitive damages. Because it was neither pressed nor passed below, this Court should decline to consider it in the first instance. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990).

Fortis argues that the South Carolina Supreme Court was the first court to consider potential-harm evidence as part of federal excessiveness review (*see* Pet. 9, 14), but that is not accurate. The trial court, in its post-judgment review, considered whether the punitive damages award was excessive in light of potential-harm evidence that the jury itself considered for that purpose, as discussed above. *See* Pet. App. 47a-48a. Fortis raised no issue concerning the trial court's treatment of that evidence, only a plenary challenge to the size of the jury's verdict.

Even if the jury had not been presented with and did not consider this evidence in assessing punitive damages, as Fortis incorrectly claims, the trial court plainly considered and relied upon this evidence in its federal excessiveness review. Fortis accordingly should have raised this lack-of-meaningful-notice issue in its appeal to the South Carolina Supreme Court. In other words, the "post hoc rationalizing" that Fortis claims violates procedural due process would have first occurred when the trial court, in denying Fortis's motion to remit the award, concluded that the award was not excessive in light of this evidence. It was the denial of that motion that Fortis appealed to the South Carolina Supreme Court, yet it did not assign error to the trial court's consideration of this evidence during federal excessiveness review.

To be clear, the trial court concluded that the award was not excessive based on evidence regarding the lifetime maximum payout under the policy—$6 million—which it considered to be the proper measure of potential harm. Pet. App. 48a, 51a; *see also id.* 21a. The South Carolina Supreme Court, by

contrast, decided to remit the award based on part of that same evidence, but only the part concerning the amount of potential future medical costs—$1,081,189.40—because it considered this figure to be the more appropriate measure of potential harm. *Id.* at 21a. Notably, both figures were based on same expert testimony about potential harm; indeed, the $6 million lifetime-maximum-payout figure includes what would have been potential future medical costs. *See id.* at 21a, 48a, 51a. Fortis therefore has no basis to argue that, prior to the South Carolina Supreme Court's disposition of the appeal, the $1,081,189.40 figure was "never before" considered as evidence of potential harm (Pet. 9), or as part of federal excessiveness review. *See id.* at 14 (claiming that "the South Carolina Supreme Court's reliance on the ratio between punitive damages and the $1,081,189.40 figure was a post hoc rationale of which Fortis lacked any meaningful notice.").[5]

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[5] While it is clear that Fortis had full and meaningful notice at the trial court level that the $1,081,189.40 figure was part of that court's potential-harm calculus, Fortis's argument that it should only have had to argue against the higher $6 million figure and not refute the lesser and included figure makes little sense. For reasons of judicial economy, appellate courts have long affirmed trial courts' judgments on different rationales than were employed below under the "right for the wrong reason" doctrine. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937). *See also Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n.1 (3d Cir. 1983) ("An appellate court may affirm a result reached by the district court on different reasons, as long as the record supports the judgment.") (citations omitted). Fortis's claim that supplying a new rationale to affirm would violate due process would indicate that courts long

In sum, if in this case consideration of evidence supporting a quantitative estimate of potential harm, during post-judgment excessiveness review, is constitutionally improper, as Fortis now argues, then that error should have been assigned as part of the appeal to the South Carolina Supreme Court. But when Fortis appealed the trial court's denial of its motion to remit the award, it failed to argue that the trial court improperly considered potential-harm evidence in a way that was not presented to the jury, in violation of procedural due process. It is difficult to read Fortis's argument as anything other than feigning surprise to grasp at a due-process handle in order to excuse its own strategic decisions and procedural failures. Given this procedural history, this Court should adhere to its practice of "declin[ing] to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.*, 493 U.S. at 224.

C. In Any Event, the Lower Courts Are Neither Conflicted Nor Confused Regarding What Impact, If Any, Post-Judgment Consideration of Potential Harm Evidence May Have on a Litigant's Due Process Right of Meaningful Notice

Contrary to Fortis's claims, the first question in the Petition is not an issue on which the lower courts are conflicted or confused. The two cases Fortis cites for the view that "courts have refused to consider potential harm in the analysis because that rationale was not placed before the jury" (Pet. 13) do not stand

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employing that venerable doctrine were acting unconstitutionally.

for that proposition. In *Security Title Agency, Inc. v. Pope*, 200 P.3d 977 (Ariz. Ct. App. 2008), the court refused to consider potential harm evidence that the jury itself considered and rejected. *Id.* at 1000. Clearly, then, the rationale at issue was in fact placed before the jury, and it was not considered by the court of appeals *because* the jury rejected it. *See id.* In *Goddard v. Farmers Insurance Co.*, 179 P.3d 645, 666 (Or. 2008), the court rejected the argument that the proper measure of potential harm was the amount plaintiffs had originally sought, because the jury, according to plaintiffs, could have awarded that amount. The reason the court in *Goddard* rejected this argument is not, as Fortis maintains, because the rationale was not placed before the jury (Pet. 12 n.4); the court rejected this argument because the rationale (or evidence) for awarding $100 million in punitive damages was put before the jury and rejected by it when it awarded a lesser amount. 179 P.3d at 666.

In addition, the three cases Fortis has identified for the proposition that courts are "invok[ing] potential harm even when the plaintiff did not invoke that rationale at trial and the jury was not instructed to consider it" cannot be fairly characterized as Fortis does. *See* Pet. 13 n.5 (citing *Tronzo v. Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir.), *cert. denied*, 534 U.S. 1035 (2001), *In re New Orleans Train Car Leakage Fire Litigation*, 795 So. 2d 364, 384 (La. Ct. App. 2001), and *Bennett v. Reynolds*, 242 S.W.3d 866 (Tex. Ct. App. 2007, *pet. granted*)). Each case receives a single sentence of explication in a parenthetical, but none is accurately characterized. For instance, in *Tronzo*, the court did not reinstate a punitive damages award, as Fortis suggests, because

of potential-harm evidence that was not presented to the jury for that purpose. *See* Pet. 13 n.5. The court reinstated the award because the defendant had waived any due process objection to the size of the award by not raising it in the first appeal. 236 F.3d at 1349-50. Accordingly, the court concluded that the district court should not have remitted the award on due process grounds when the case was remanded to it. *Id.* at 1350.

Next, in citing *In re New Orleans*, Fortis appears to argue that the court in that case read this Court's decision in *TXO* to permit the post-judgment invocation of a rationale that was not presented to the jury. That is not what the court said. *See* 795 So. 2d at 384. The court there recognized that both *TXO* and *BMW* indicate that courts can consider the potential harm likely to have been caused to a plaintiff, in the course of due process excessiveness review. *Id.* The court then noted that in *TXO* there was no specific jury finding respecting the amount of potential harm, thus suggesting that it, too, could consider potential-harm evidence in the absence of a specific jury finding. *See id.* Nevertheless, that statement, which Fortis quotes (*see* Pet. 13 n.5) does not indicate that the rationale itself, or evidence of potential harm, was never presented to, or considered by, the jury in that case.

Lastly, Fortis cites *Bennett v. Reynolds* as an example in which a court took account of potential harm in its excessiveness review even though the jury never specifically found such harm. But consideration of potential harm was unobjectionable, the court explained, because in that case "Bennett admitted that such damages from being wrongfully

accused of cattle theft would be substantial." 242 S.W.3d at 905. Thus, nothing in *Bennett* indicates that the parties lacked meaningful notice that potential harm could (or would) be considered. *See id.* at 906 ("Bennett's testimony is significant as it bears on the notice concerns that are the ultimate focus of our due process analysis.").

In sum, these cases, properly understood, reveal that the lower courts are neither conflicted nor confused about when potential-harm evidence may be considered on appeal in the course of excessiveness review. This Court's review, accordingly, is unwarranted.

III. There Is No Reason to Revisit Standards for Due Process Excessiveness Review, Which Lower Courts, Including the Court Below, Are Faithfully and Properly Applying

Fortis, in its second question presented, urges this Court to revisit its punitive damages jurisprudence because, in its view, lower courts remain confused about how to conduct federal excessiveness review. The unanimous decision of the South Carolina Supreme Court is emblematic of that confusion, according to Fortis, as all five justices made "fundamental errors with regard to each guidepost" (Pet. 19) in the course of remitting the punitive damages award at issue here. To the contrary, the court below, in a lengthy and considered decision, correctly applied this Courts' well- (and much-) elaborated punitive damages jurisprudence to the particular facts of this case, painstakingly going through each guidepost and aggravating factor. The court remitted the award to

an amount that "adequately vindicate[s] the twin purposes of punishment and deterrence that support the imposition of punitive damages," placing "great emphasis" on the fact that the jury found that "Fortis willfully disregarded Mitchell's health and safety." Pet. App. 24a. It properly stated this Court's standards for federal excessiveness review and committed no error in their application. Nonetheless, even if it had misapplied a properly stated rule of law, as Fortis claims, that is not a "compelling" reason for granting certiorari. *See* Sup. Ct. R. 10. For this reason, Fortis's second question presented—that the "South Carolina Supreme Court's [a]pplication [o]f [t]he BMW [g]uideposts [w]arrants [r]eview," Pet. 18—fails to present a certworthy issue for this Court's consideration.

What is more, the lower courts are not in need of further guidance from this Court as to how to conduct federal excessiveness review that accounts both for the "elementary notions of fairness," *BMW*, 517 U.S. at 574, and for the rationale for imposing punitive damages in the first place—punishment and deterrence, *id.* at 568. This Court's due-process jurisprudence relating to punitive damages, which is already robust and clear, and this Court's own application of these guideposts to specific facts in multiple cases, provide ample guidance. Given the absence of any real or legitimate confusion in their application, this Court's review is unnecessary.

A. Certiorari Is Not Warranted to Reconsider and Radically Rework the Reprehensibility Guidepost

This Court has repeatedly stated that the three guideposts are independent markers of

reasonableness and that, of the three, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S., at 575). And it has provided additional, aggravating factors for consideration to determine whether conduct is highly reprehensible, indicating that the greater the number of factors implicated, the more reprehensible the conduct. *Id.* Fortis claims that courts are treating these factors "robotically" as "checklists," and that this Court should grant review in order to instruct them not to adhere "rigidly" to these factors in assessing whether an award is reasonable.[6] Surely a harm that is physical, that displays a reckless disregard for health, that is aimed at a financially vulnerable person, that is repeated, and that is the product of deceit—as was the case here—is more blameworthy than conduct that is not, and is more likely "to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (citing *BMW*, 517 U.S. at 575). There is nothing "rigid" in so concluding. If anything, careful consideration of each factor provides notice of the type of conduct that may be deemed highly reprehensible, and lends a measure of consistency to the analysis; inviting less rigid consideration of these factors would work against these goals.

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[6] Ironically, at the same time Fortis attacks lower courts for "often" applying the *BMW* guideposts "mechanically," Pet. 19, it argues in favor of a mechanical application of a 1:1 ratio without consideration of this Court's teachings that some wrongs are more blameworthy than others. *BMW*, 517 U.S. at 575.

Fortis also asks this Court to reconsider reprehensibility's status as the "most important indicium" of reasonableness and proposes that the reprehensibility and comparability guideposts be conflated. This Court should abandon its current framework, Fortis argues, because lower courts, in applying the factors, are "los[ing] sight of the forest for the trees." Pet. 21. But its proposal would only detract from the historic centrality of reprehensibility in the due-process calculus, which is central precisely because of its big-picture focus: reprehensibility is the best gauge of reasonableness, this Court has repeatedly concluded, and a reasonable award is one that advances the twin purposes of punishment and deterrence. *See State Farm*, 538 U.S. at 575. This conclusion is sound and need not be revisited.

Fortis also urges this Court to jettison its current framework because, in its view, even if the harm at issue in a particular case satisfies all of the non-exclusive reprehensibility factors, it may not be highly reprehensible if others are also engaging in similar harmful acts. *See* Pet. 19. To account for this so-called concern, Fortis invites the Court to conflate reprehensibility and comparability. This move is "critical[]", Fortis maintains, because "all punishable conduct is reprehensible to some degree." Pet. 19 (emphasis removed).

There is no good reason for this Court to accept Fortis's invitation. The benefits of considering and comparing similar instances in which penalties are assessed are already derived by the application of the independent comparability guidepost. It would otherwise be inappropriate to import this analysis

into the reprehensibility guidepost because Fortis's proposed inquiry—how reprehensible is this conduct if everyone else is doing it?—would excuse reprehensible conduct solely on the basis of its pervasiveness and encourage a race to the bottom. The act of repeatedly and maliciously placing an individual's health in jeopardy in an effort to maximize profit is no less reprehensible because others are similarly greedy. This sort of grade-school excuse does not illuminate federal excessiveness review, and certainly it is not preferable to the sound and well-established framework that this Court has set out. If anything, this proposed analysis would sow confusion by requiring mini-trials in which juries hear evidence concerning the conduct of others in order to determine whether other instances of reprehensible conduct may be comparable to the case squarely before them. It would raise profound due-process issues for a plaintiff to have to investigate and rebut claims of bad conduct by non-parties to the litigation in order to demonstrate that the misconduct aimed at him was truly reprehensible. *Cf. Philip Morris*, 127 S. Ct. at 1063 (stating that similar use of harm to nonparties would add a "a near standardless dimension to the punitive damages equation."). Fortis's suggestion to rework the reprehensibility guidepost in this manner deserves no further consideration.

B. Certiorari Is Not Warranted to Consider Whether to Adopt a 1-to-1 Ratio of Compensatory to Punitive Damages

Fortis also requests certiorari so that this Court may clarify its statement that in cases in which compensatory damages are substantial, a 1-to-1 ratio

of compensatory to punitive damages may mark "the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. It thus imagines a conflict between cases in which the ratio is 1-to-1, and any other case in which the ratio is not—without any attention to the particular facts of these cases, including whether specific compensatory awards were substantial. *See* Pet. 27.

In making that claim, Fortis attempts to manufacture a mathematical bright-line strait-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together—and so states in the very case Fortis asserts held otherwise. *See State Farm*, 538 U.S. at 424-25 ("We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.") (citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggested a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon the facts and

circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

Given that there is no constitutionally mandated ratio, and that determination of punitive damages is a fact-intensive inquiry, *see id.* at 425, no conflict can exist simply by virtue of different outcomes. Nor is it significant that some courts may find a single-digit ratio to be constitutionally valid under the particular set of facts before them. *See* Pet. 27 n.15. Instead, courts are doing what courts are supposed to do: evaluating the record *de novo* and determining what punitive award properly accomplishes the State's legitimate interest in punishment and deterrence.

C. Certiorari Is Not Warranted to Reconsider the Comparability Guidepost

Courts do consider the comparability guidepost, *see* Pet. 28-29 nn.16-17 (collecting cases in which the comparability guidepost is considered), and their application of that guidepost is consistent with this Court's precedents. Fortis acknowledges that the South Carolina Supreme Court considered this guidepost in its analysis, but claims that the decision below exemplifies a trend: some courts are "refusing to treat the existence of a low fine as an indication that a high punitive award is excessive," while others are remitting awards based on a comparison of the award and a civil or criminal penalty. *Id.* at 29. There is no such problematic trend or conflicting treatment.

Fortis's insistence that it has discovered a conflict in the treatment of the comparability guidepost is predicated on a misunderstanding of that guidepost: that is, punitive damages awards, according to

Fortis, must be remitted in each and every case based on comparable civil or criminal penalties. That understanding of the law is plainly incorrect, because it would render the comparability guidepost the ne plus ultra consideration of federal excessiveness review—which it is not (*see State Farm*, 538 U.S. at 419); and because it would render consideration of the first two guideposts a futile exercise in many, if not most, cases.

Fortis fails to establish a conflict for a separate reason: it imagines a conflict between cases in which awards are remitted in view of civil or criminal penalties, and any other case in which civil or criminal penalties are not outcome determinative—without any attention to the particular facts of these cases, including whether the other guideposts outweighed the third in a particular case. *See* Pet. 27. If anything, the cases Fortis cites demonstrate that courts are properly factoring the comparability guidepost into their federal excessiveness review and treating it as one of three considerations. *See id.* nn.16-17.

That is true as well of the decision below, which carefully considered civil penalties assessed in other cases in South Carolina and, in accordance with those penalties, remitted the award, thereby bringing it in line with other comparable instances of highly reprehensible conduct. Indeed, the South Carolina Supreme Court's consideration of comparability is plainly separate from its proportionality analysis (*see* Pet. App. 22a-24a), contrary to Fortis's suggestion (Pet. 31), and thus the court below properly considered and accorded each factor due weight. For these reasons, review of the

application of the comparability guidepost in this case is unwarranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

February 19, 2010

Respectfully submitted,

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APPENDIX A:
ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
C/A NO: 2003-CP-21-1347

JEROME MITCHELL, JR.
PLAINTIFF,

VS.

FORTIS INSURANCE COMPANY,
DEFENDANT.

ORDER

This matter comes before the Court on Defendant's Motion to Alter or Amend Judgment Pursuant to Rule 59(e). The Motion asserts an initial argument which is not numbered, in addition to six (6) enumerated grounds for relief. Each will be addressed in turn.

In its initial unnumbered argument, Defendant asserts that the Florence County Clerk of Court improperly enrolled the jury's verdict as a judgment, bearing Judgment Roll number 119832, without entering a new judgment form or an amended judgment form after Plaintiff elected his remedy. The jury awarded $36,600 (Thirty-six thousand six hundred dollars) in actual damages on the breach of contract cause of action; and $150,000 (One hundred

fifty thousand dollars) actual damages and $15,000,000 (Fifteen million dollars) punitive damages on the bad faith cause of action. Defendant made a post-trial motion to require an election, and Plaintiff elected to recover the actual and punitive damages awarded on the bad faith cause of action. The Court confirmed that election by Order dated July 19, 2006. In the Court's view, that Order had the legal effect of amending the judgment so as to delete the $36,600 (Thirty-six thousand six hundred dollar) award for actual damages on the breach of contract cause of action. It would be superfluous to require a separate formal amendment of the judgment, since the July 19, 2006 Order confirms that Plaintiff elected the verdict for bad faith; thereby rendering moot the award of damages for breach of contract.

1. Defendant asserts that this Court failed to conduct a post-trial review of the jury's punitive damages verdict on a *de novo* basis. Defendant cites *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 121 S.Ct 1678 (2001) for the proposition that a trial court must conduct a de *novo* review of a punitive damages verdict. That is technically incorrect. In *Cooper Industries, supra,* the Court actually held that the Ninth Circuit Court of Appeals must perform a *de novo* review of the federal trial court's review of a punitive damages verdict. Nevertheless, this Court did conduct its own independent *de novo* review of the evidence and made findings and conclusions which were initially stated on the record in open court, then reduced to writing and expanded upon in the July 19, 2006 Order. The Court's references to evidence adduced at trial and permissible jury inferences reflected the Court's analysis of the evidence, the justification for

the jury's verdict and the Court's own findings and conclusions. Similar analyses have been performed by numerous appellate courts including justices of the U.S. Supreme Court. See *State Fm Mutual Insurance Company, Inc. v. Campbell*, 538 U.S. 408, at 430 et seq., 123 S.Ct 1513 at 1527 et seq. (GINSBERG, J., dissenting); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000). To avoid any potential misunderstanding of the Court's five references to evidence and permissible inferences in the July 19, 2006 Order, addressed in the Defendant's Motion on p.2 lines 4-8, the Court hereby clarifies that in its *de novo* review of the evidence underlying the punitive damages award, the Court expressly finds that: (a) Defendant Fortis either destroyed or concealed documentation of Mary Wiggins' phone call to Kate Stephens; (b) Defendant did originally have access to or possession of the May 2002 lab report and initial records from Dr. Shea which definitively established the date of Plaintiffs diagnosis and treatment in 2002, but chose to ignore and conceal them when it decided to rescind the policy; (c) Defendant requested only itemized bills directly from Dr. Shea, but no records, because Defendant already had possession of or access to such records; (d) Defendant did engage in a pattern of secrecy and concealment in this case; (e) Defendant's general counsel did insist that members of the rescission committee conceal the identity of the persons present and involved in making a decision to rescind a Fortis health insurance policy.

2. Defendant also contends that the Court erred in considering the ratio of punitive damages to potential harm, rather than restricting its analysis to the ratio of punitive damages to the actual damages awarded by the jury in this case. The Court did

evaluate the punitive damages award by comparing the ratio of punitive damages to the potential harm Plaintiff might have suffered from Defendant's bad faith rescission. That is in accord with numerous controlling precedents from the U.S. Supreme Court and the South Carolina appellate courts. *See, e.g., TXO Production Corporation v. Alliance Resources Corporation*, 509 US. 443,113 S.Ct. 271 1 (1993); *Hundley v. Rite Aid, supra.*

Defendant argues that *TXO Production* has no precedential value, because it was a plurality opinion. The Court acknowledges that *TXO* was a plurality opinion, but disagrees that it has no precedential value. Defendant ignores that the U.S. Supreme Court has steadfastly maintained after *TXO* that the ratio to be considered is between punitive damages and actual or potential damages caused by a Defendant.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) the Plaintiff had purchased a BMW automobile believing it would be in new and pristine condition, when it had in fact sustained presumed acid rain damage in transit from the factory to the dealer. The BMW vehicle had been repainted to cover up the damage; but in accordance with corporate policy that fact was not disclosed to the Plaintiff. The jury awarded $4,000 (Four thousand dollars) actual damages and $4,000,000 (Four million dollars) punitive damages, the latter being reduced to $2,000,000 (Two million dollars) by the Alabama Supreme Court. The U.S. Supreme Court vacated the reduced punitive damages award as being excessive under its due process analysis. In doing so, however, the Court favorably cited the use of the "potential harm" analysis in TXO and based its decision in part

on the fact that neither Dr. Gore nor any other BMW purchaser "was threatened with any additional harm by BMW's nondisclosure policy." *BMW v. Gore, supra*, 517 U.S. at 581, 582. Unlike *Gore*, in this case, Defendant's wrongdoing threatened Plaintiff with potential additional harm much greater than his actual damages, thus supporting a higher award of punitive damages.

The Court in *State Farm v. Campbell, supra*, identified the second *Gore* guidepost for reviewing the constitutionality of punitive damages awards to be: "the disparity between the actual or potential harm suffered by the Plaintiff and the punitive damages award." *State Farm* v. *Campbell, supra*, 538 U.S. at 418. In applying this second *Gore* guidepost, the Court in *State Farm v. Campbell* emphasized that "[wle have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." (Emphasis in original.) *Id*, at 424-425.

In *James v. Horace Mann Insurance Co.* (Opinion No. 26231, *Shearhouse Advance Sheet*, No. 45, p.24, filed November 27, 2006), the South Carolina Supreme Court recognized that the ratio to be evaluated is between punitive damages and actual or potential damages. This principle is well established, and Defendant's arguments to the contrary are without merit.

Defendant also argues, incorrectly, that *TXO* applies only where the Defendant attempts a tort which fails. In so arguing, Defendant confuses two types of potential damage: (1) that from an attempted tort which fails; and (2) that from a tort

which succeeds in part but causes less damage than it foreseeably may have caused. Both types are involved in this case.

As to the first type of potential harm, an attempted tort which fails, Defendant asserts that its tort against the Plaintiff was successful, and that Plaintiffs potential damages should therefore not be considered when analyzing the propriety of the punitive damages award in this case. The Court views Defendant's tort differently. The Defendant's tort may arguably have succeeded for the three years during which Plaintiff's health insurance policy was wrongfully rescinded. However, the Court has serious doubts that the Defendant's goal in committing the tort was to rescind Plaintiff's policy for only three years. To the contrary, the Court finds that the Defendant's goal in wrongfully rescinding the policy was to rescind the policy in perpetuity. Defendant reinstated the policy only in the face of litigation, after approximately three years of rescission. To the extent that Defendant ultimately reinstated the policy, therefore, the Court finds that the Defendant's tort failed. In evaluating the propriety of the punitive damages award, this Court must consider the potential harm to Plaintiff if the policy had been successfully rescinded throughout his lifetime.

The second type of potential harm involves a tort which succeeds to some extent, but which involves less actual harm than could have potentially and foreseeably resulted. In *TXO, supra*, the U.S. Supreme Court cited a hypothetical which exemplifies this form of potential harm:

For instance, a man wildly fires a gun into a crowd.

By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts. [Citations omitted] *TXO, supra*, 509 *U.S.* at 459-460,113 S.Ct at 2721.

In evaluating the propriety of the punitive damages award, it is thus also proper for the Court to consider potential harm that might have resulted from a successful tort, where the victim manages to avoid the worst potential damages. In this case, but for the Plaintiff's actions in mitigating his damages by (1) obtaining free health care for his HIV from Hope Health, and (2) procuring the services of legal counsel to fight Defendant's wrongful rescission of his policy, the potential and foreseeable harm to the Plaintiff from Defendant's wrongful rescission would have involved a tumultuous decline in his health and his eventual untimely and miserable death from AIDS.

Defendant further argues, erroneously, that the Court should only consider the potential harm to Plaintiff that occurred within the three year rescission period, rather than the potential harm to Plaintiff throughout his lifetime. Defendant bases that argument on the fact that Defendant finally reinstated the policy during litigation, shortly after the policy had been rescinded for three years. In making these arguments, Defendant fails to acknowledge that the potential harm from wrongfully rescinding Plaintiff's policy includes the potential harm to Plaintiff from the intended permanent rescission. The mere fact that Defendant

decided to reinstate the policy after it became involved in litigation of the matter does not entitle Defendant to truncate the measure of Plaintiff's potential damages as of the reinstatement date. The potential harm to Plaintiff from the wrongful rescission was a lifetime of no coverage and the adverse health consequences of having no coverage, including an early demise from AIDS.

Next Defendant argues, erroneously, that Plaintiff's potential death cannot be considered as part of the potential harm from its wrongful rescission, because (1) Defendant did not cause Plaintiff to contract HIV; (2) it asserts that Plaintiff could have gotten health insurance from another provider; and (3) it asserts that free medical care for HIV patients is widely available and would have prevented Plaintiff's death. As to the first prong of this argument, it is of course true that Defendant did not cause Plaintiff to contract HIV. However, Defendant's wrongful rescission ended Plaintiff's existing plan for receiving private treatment from Dr. Shea. If Plaintiff had been unable to obtain substitute treatment, a foreseeable potential harm from the wrongful rescission, Plaintiff's HIV would have become AIDS within two years; and Plaintiff would have died within one to two years thereafter. As to the second prong of Defendant's argument, Plaintiff's HIV status and the fact of the rescission of his Fortis policy made it highly unlikely that he would be able to obtain comparable insurance from any other health insurance carrier.[1] Whether

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[1] Evidence was presented that Defendant refuses to provide health insurance at any price to an HIV patient on an individual policy, such as Plaintiff's, and that its premium increases 4,000% (Four thousand percent) when

Plaintiff could fortuitously obtain other coverage is not the issue.[2] The issue is whether the potential harm to Plaintiff from the wrongful rescission of his policy by Defendant included his untimely death, and the Court finds that it did. The third prong of Defendant's argument asserts that Plaintiff did not face potential death from Defendant's wrongful rescission, because there were allegedly many sources of free medical care available to HIV patients such as the Plaintiff. A part from Plaintiff's obtaining free health care from Hope Health, the Court notes that there was no evidence presented at trial of the availability of any other free medical care to Plaintiff. At any rate, the availability of free health care to Plaintiff at Hope Health or anywhere else independent of the wrongdoer represents a gratuitous service and a collateral source which cannot be used by a tortious Defendant to limit its liability. "The collateral source rule provides that

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it is forced to cover a HIV patient under a group plan. Plaintiff's initial premium for his policy with Defendant was approximately $90 (Ninety dollars) per month. A 4,000% (Four thousand percent) increase in Plaintiff's premiums would approximate a premium of $3,600 (Three thousand six hundred dollars) per month; or $43,200 (Forty-three thousand two hundred dollars) per year.

[2] Evidence was presented at trial that Plaintiff had recently obtained employment with Blue Cross Blue Shield (hereinafter "BC/BS") as a computer operator. There is nothing in the record to suggest Plaintiff's BC/BS coverage was comparable to the Fortis coverage nor was there any evidence that it would have provided Plaintiff benefits for HIV. Plaintiff testified that he had never submitted any claim to BC/BS and did not intend to do so. Plaintiff further testified that he desired to keep BC/BS and his co-workers from learning of his HIV status.

compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." *Rattenni v. Granger,* 298 S.C. 276,379 S.E.2d 890 (1989); *Young v. Warr,* 252 S.C. 179,165 S.E.2d 797 (1969); *Powers v. Temple,* 250 S.C. 149,156 S.E.2d 759 (1967). This rule has been liberally applied in South Carolina to preclude the reduction of damages. *See Otis Elevator v. Hardin Construction Co.,* 316 S.C. 292,450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni v. Granger, supra* (tortfeasor's liability for damages not reduced by proceeds from underinsured motorist coverage); *Powers v. Temple, supra* (tortfeasor's liability for damages not reduced by disability payments from employer); *New Foundation Baptist Church v. Davis,* 257 S.C. 443, 186 S.E.2d 247 (1972) (tortfeasor's liability for damages not reduced by value of gratuitous repairs). For the same policy reasons, the potential availability of gratuitous services or collateral sources cannot be used by a Defendant in a post-verdict review of a punitive damages award to limit the potential damage from the Defendant's wrongful conduct and thereby reduce its punitive damages exposure. Defendant's argument that its wrongful rescission did not have the potential to cause Plaintiff's death, since gratuitous care was available at Hope Health represents an effort to divert to Defendant the benefit of Hope Health's generosity intended for the Plaintiff. *New Foundation Church v. Davis, supra.*

Defendant also contends that it was not likely that Plaintiff would ever have received $6,000,000 (Six million dollars) worth of health insurance

benefits under his policy with Defendant. Defendant argues that evidence was presented showing a cost slightly in excess of $1,000,000 (One million dollars) for treatment of Plaintiffs HIV over his lifetime, without taking into account his deductibles and co-payment obligations. Defendant's argument ignores that the estimated lifetime cost of providing HIV care presented at trial was conservative in that it used wholesale cost for drugs and certain other items of care, did not include provision for treating any complications or side effects of HIV, did not include provision for new drugs that may be created in the future for better treatment of HIV at a more expensive price, and did not include any provision for treating AIDS, if the Plaintiff's HIV should progress into AIDS. Also, the cost figures presented at trial did not include any cost of treating accidental injuries or other diseases that Plaintiff may experience during his lifetime. Given the Plaintiff's youth, HIV condition, conservative future cost estimates for treating HIV, potential complications and side effects of HIV and the unknown costs of treating other injuries and diseases, the Court concludes that the value of Plaintiff's policy over his lifetime could possibly be as high as the lifetime maximum benefit of $6,000,000 (Six million dollars) under Plaintiff's policy. Moreover, those figures reflected a reduction to present value of estimated future HIV treatment costs. Thus, Plaintiffs potential harm from rescission of his policy includes much more than the loss of health insurance coverage for the $1,000,000 (One million dollars) present value estimate for treating HIV. It is true that Plaintiff would face deductibles and co-pays under his health insurance policy with Defendant, but nevertheless Defendant sold Plaintiff a health insurance policy with the maximum lifetime benefit

of $6,000,000 (Six million dollars). That lifetime maximum benefit represents the high end of the potential insurance coverage loss to Plaintiff from the wrongful rescission of his policy. That $6,000,000 (Six million dollar) maximum lifetime coverage was bargained for as part of the insurance contract. The loss of that coverage because of Defendant's wrongful rescission caused Plaintiff to lose the benefit of continuing coverage up to that maximum amount as long as he paid his premiums.

But for Plaintiff's good fortune in obtaining free medical treatment of his HIV from Hope Health, his death would have most likely occurred within three to four years of the Defendant's wrongful rescission of his policy. Such potential death from AIDS would have been horrific, and would justify $3,000,000 (Three million dollars) or more in actual damages for the reasons described in detail in the Court's prior Order. Similarly, Defendant's wrongful rescission deprived Plaintiff of the $6,000,000 (Six million dollars) lifetime maximum benefit in his policy. That coverage limit was bargained for by Plaintiff and may potentially have been used up during Plaintiff's lifetime because Plaintiff was young, had HIV and faced the normal risks of other injuries and diseases throughout the remainder of his lifetime in addition to the risk of HIV complications including AIDS.

3. Defendant next argues that the Court's July 19, 2006 Order should not have addressed the issue regarding ambiguity about the rescission. Defendant asserts that the rescission date is September 5, 2002, and argues that such date is clear and unambiguous. Defendant further argues that Plaintiff accepted that date and did not previously assert that Defendant's rescission was not completed until the second

rescission committee met in June 2003, or later. Defendant is incorrect. Defendant ignores the evidence from its own employees which established that they did not consider rescission final or complete until long after the rescission letter was mailed. Plaintiff's counsel did address the Court about this issue during trial by requesting a jury charge on that point. Although the Court declined to charge the jury on that specific factual point, the Court recognized Plaintiffs right to proceed with that argument based on the evidence adduced from Defendant's own employees.

4. Defendant also argues that the punitive damages award in this case cannot withstand scrutiny under the third guidepost set forth in *BMW v. Gore, supra,* i.e., a comparison of the punitive damages verdict to other civil penalties. Defendant argues that it is improper for the Court to compare the punitive damages award in this case to punitive damages awards in other cases; and even if it were proper, that the amount of the punitive damages award in this case does not compare favorably with other awards that have been upheld in South Carolina and elsewhere. Defendant's argument ignores that the South Carolina Supreme Court has itself interpreted the third *Gore* guidepost as allowing a comparison between the punitive damages award in the case being appealed with punitive damages awards in other cases. *Atkinson v. Orkin Exterminating Co., Inc.,* 361 S.C. 156, 604 S.E.2d 385 (2004). The Court's favorable comparison of the subject punitive damage award to punitive damages awards in other civil cases was in accord with the approach used in *Atkinson, supra.*

The result is no different if one compares the

punitive damages verdict with the statutory civil penalties for violation of South Carolina law by insurance companies. Under *South Carolina Code of Laws 5* 38-2-10(1), each separate violation of the South Carolina insurance laws is subject to (a) a fine of $15,000 (Fifteen thousand dollars) if not "willful;" (b) a fine of $30,000 (Thirty thousand dollars) if "willful;" and/for (c) suspension or revocation of the insurer's authority to do business in this state. Although it is difficult to put a monetary value on Fortis' authority to continue doing business in South Carolina, the Court may take judicial notice that its authority to engage in the insurance business in South Carolina is a significantly valuable right. Viewed in that light, the punitive damages award of $15,000,000 (Fifteen million dollars) does not seem excessive compared to the statutory civil penalties available under South Carolina law. Moreover, in a recent case our Supreme Court has clarified its conviction that the monetary civil penalties set forth in the statute do not provide a useful comparison for evaluating the propriety of a meaningful punitive damages award in an insurance bad faith case. *James v. Horace Mann Insurance Co., supra.* As the Court noted in *James*, [w] find the statutory penalties are set at 'such a low level, there is little basis for comparing it with any meaningful punitive damages award.' [Citations omitted] *James, supra,* at p.31.

Defendant's argument about lower punitive damages awards being upheld is not persuasive at all. Defendant points out that South Carolina appellate courts have approved several punitive verdicts that were lower than the award in this case; and argues that since lower verdicts have been upheld, the higher punitive damages verdict in this

case is improper. That argument lacks logic, since the approval of lower verdicts in no way indicates that higher verdicts are improper. The Courts in those cases determined that the jury verdicts should not be disturbed but should be given deference. There is no bright line by which to judge a ratio of punitive damages to actual or potential damages, and under well-established law the subject award of punitive damages is easily justifiable for the reasons set forth in the Court's July 19, 2006 Order.

A significant part of the rationale for *de novo* review of the punitive damages award is for the Court to evaluate independently the Defendant's degree of culpability and reprehensibility. This Court determined Fortis' culpability to be extreme and outrageous, and determined that Fortis acted with a high degree of reprehensibility in callous disregard of the adverse effects on Plaintiff's health and life expectancy. The punitive damages award in this case compares favorably within the guidelines approved in other cases by the appellate courts of South Carolina. *See, e.g., Collins Entertainment Corporation v. Coates and Coates Amusement Rental*, 2005 WL 394000 (S.C. 2006); *Hundley v. Rite Aid of SC, Inc.* 339 S.C. 285,529 S.E. 2d 45 (Ct. App. 2000); *Taylor vs. Medinica*, 324 S.C. 200,479 S.E. 2d 35 (1996); *Cock-N-Bull Steakhouse v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727(1996). It is also in accord with guidelines approved by the U.S. Supreme Court. *See, e.g., TXO Production v. Alliance Resources, supra.*

5. Defendant asserts that this Court failed to rule on seven (7) of its arguments in the July 24, 2006 Order. Defendant designates those arguments as subparagraph (a) through subparagraph (g). In

addressing those issues, the Court will consolidate subparagraphs (a) through (c), (d) through (e), and *(f)* through (g), addressing each grouping in turn.

The first three of these defense arguments to be addressed are:

(a) Whether $150,000 in compensatory damages are "substantial" or not under *State Farm Mutual Automobile Insurance Co. v. Campbell, 538* U.S. 408,425 (2003);

(b) Whether Plaintiff had been made whole (and any economic damages reimbursed) through the retroactive reinstatement of his policy prior to trial;

(c) Whether the actual damages awarded already contain a punitive element via an award for emotional distress.

Defendant argues that the award of $150,000 (One hundred fifty thousand dollars) in compensatory damages represents a "substantial" award as that word is used in the case of *State Farm Mutual Automobile Ins. Co. v. Campbell, supra*. That is, Defendant argues that the amount of compensatory damages is disproportionately high compared to the actual damages suffered by Plaintiff, and that the award for compensatory damages has been inflated so as to contain a punitive element. The Court disagrees. As in *James, supra*, there was ample evidence of actual damages to support the compensatory damages award. See the Court's July 19, 2006 Order, page 24, line 8-page 27, line 10. As in *James*, the compensatory damages verdict included non-economic damages, but that

was necessary to make Plaintiff whole. The compensatory damages award deemed "substantial" in *State Farm v. Campbell, supra,* was $1,000,000 (One million dollars),[3] far more than the compensatory damages award in this case. That case, as well as the *James* case, involved economic damages resulting from a failure to settle within policy limits, whereas this case involves rescission of health insurance in the context of Plaintiff's urgent need to receive treatment for HIV to avoid a serious decline in his health status leading to death within three to four years. The Court concludes the award of $150,000 (One hundred fifty thousand dollars) actual damages in this case was amply warranted by the evidence of actual harm sustained, and does not contain any punitive element. Thus, the $150,000 (One hundred fifty thousand dollars) award of actual damages was not "substantial" within the meaning of *State Farm v. Campbell, supra.* Indeed, this case is more akin to those in which "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm* v. *Campbell, supra, 538 US* at 410. The U.S. Supreme Court recognized that due process constraints are relaxed concerning permissible ratios in such cases. This case also fits into the line of cases where punitive damage restrictions are relaxed where "monetary value of non-economic harm might have been difficult to determine." *BMW v. Gore, supra,* 517U.S. at 582; *Mathias* v. *Accor Economy Lodging Inc.,* 347 *F.* 3d 672 (7" Cir. 2003); *Hundley v. Rite Aid supra,* 529 *S.E.* 2d at 62. Limiting punitive damages in this case to ten times the actual damages award would represent a defense victory, and thus encourage

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[3] Reduced from the jury award of $2,000,000 (Two million dollars) by the Utah Supreme Court.

rather than deter Defendant's wrongful conduct.

Defendant also contends that the punitive damages award is excessive because of its argument that Plaintiff has been made whole through the retroactive reinstatement of his policy and payment of prior claims. The Court disagrees. Through no fault of his own, Plaintiff went without health insurance coverage in excess of three years. A health insurance consumer purchases the insurance to obtain peace of mind that he will have affordable healthcare. When an insurer wrongfully rescinds a health insurance policy, and maintains the rescission in excess of three years, that causes damages which cannot be remedied by merely reinstating the policy and repaying those bills that were incurred during the three year period. *See, e.g., University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp.*, 335 F.Supp.2d 702 (D.S.C. 2004); *Goodson v. American Standard Insurance Company of Wisconsin*, 89 P.3d 409 (Col. 2004). Moreover, after Fortis informed Plaintiff his health insurance policy had been reinstated, Plaintiff attempted to use his policy at a drugstore and was informed the policy benefits were still not available to him, further undermining Plaintiff's peace of mind. The Court thus finds that reinstatement of the policy and payment of prior bills incurred did not make Plaintiff whole. It is worth noting that in *State Farm v. Campbell, supra,* State Farm had paid the excess verdict rendered against Campbell in the underlying case, and the U.S. Supreme Court recognized that Campbell was nevertheless entitled to actual and punitive damages, albeit a lower amount of punitives.

The next two defense arguments to be

addressed are:

(d) How Plaintiff suffered any economic harm when he testified that he would have gone to the free clinic regardless of whether the Policy was rescinded or not;

(e) How Plaintiff suffered any emotional distress by being embarrassed by going to the free clinic when he testified that he would have gone regardless of the rescission to avoid the co- pays and deductibles (and indeed went to the free clinic prior to the rescission).

Defendant misconstrues the evidence about Plaintiff's pre-rescission contact with Hope Health. Plaintiff never testified that he transferred his primary treatment to Hope Health prior to rescission or that he would have gone to the free clinic for his primary treatment if the policy had not been rescinded. Plaintiff testified that Dr. Shea, his first infectious disease specialist, and his treating physician under his Fortis policy, recommended prior to rescission that Plaintiff request help from Hope Health with the co-pay portion of the price for prescription drugs needed for treatment of his HIV. There was no testimony that Hope Health would be paying all of Plaintiff's bills; just the minimal involvement required to permit Hope Health to help Plaintiff with the co-pay portion of his prescription drug expense. There was no testimony that Hope Health would have provided any treatment, absent rescission, except to the limited extent of its involvement necessary to provide financial subsidies for the cost of Plaintiff's prescription drugs. Having had Hope Health assist Plaintiff, prior to the rescission, with payment of the co-pay portion of

required HIV drugs does not in any way indicate a lack of economic harm from the rescission. Defendant's wrongful rescission and refusal to pay Dr. Shea's bills caused Plaintiff to lose the ability to be treated by Dr. Shea, Plaintiff's personal choice of physician, at Dr. Shea's private office. The evidence shows Plaintiff would have continued to use his Fortis health insurance for his HIV treatment at Dr. Shea's private office, including the insurance contribution toward the cost of prescription drugs, but for the bad faith rescission of the policy by Fortis.

Similarly, the bad faith rescission did cause Plaintiff emotional distress. Plaintiff was previously distraught about his diagnosis of HIV, but prior to rescission he at least was confident he had health insurance to help pay for quality treatment. His doctors impressed upon him the absolute necessity of regular daily compliance with his treatment regimen to prevent his immune deficiency status from worsening dramatically and spiraling out of control. Defendant's bad faith rescission removed that confidence that Plaintiff would be able to maintain regular care to maintain his current immunity status. The sudden, undeserved loss of his health insurance threatened Plaintiff's ability to comply with his regular treatment plan and induced a fear in Plaintiff that he would not get appropriate treatment but would face a tumultuous decline in his health status leading to an early death. Plaintiff knew Hope Health had helped him with the co-pay portion of his drug bas, but he did not know at the time of rescission that Hope Health may be able to provide his primary treatment. After rescission, four months passed before Plaintiff was able to schedule an office visit with the Hope Health physician on January 18, 2003 in the effort to transfer his primary

treatment to Hope Health. *See* Plaintiffs Trial Exhibit 50a. Thus, the Court finds that Defendant's wrongful rescission did cause Plaintiff severe mental and emotional anguish.

There was no evidence of Plaintiff transferring his primary care to the free clinic before rescission. His only contact with Hope Health prior to rescission was by requesting financial help with the co-pay portion of his prescription drug bills, and the minimal involvement required for Hope Health to provide that assistance. Plaintiff's transfer of primary treatment to Hope Health was not made until after rescission; and was necessitated by that bad faith rescission of Plaintiffs policy. The only personal visit by Plaintiff to Hope Health prior to rescission was on July 2, 2002 for the initial examination[4] needed to get onto the program to assist with prescription drug co-pays. The embarrassment Plaintiff testified about suffering from going to the free clinic rather than Dr. Shea's private office for his primary treatment occurred after the rescission, not before. Prior to rescission, Plaintiff bad only the one-time visit to qualify for financial help from Hope Health with drug co-pays.

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[4] See document Bates-stamped Hope for Pee Dee P 00022, which was presented to the Court by Defendant prior to the hearing on its Rule 59(e) Motion. In it, Dr. Htay ordered certain laboratory tests to be done six weeks later, to check on the efficacy of drugs provided by Hope Health. The lab work was done on August 15, 2002 by Labcorp Holdings, and submitted to Defendant by Fortis for payment. See Plaintiffs Trial Exhibit 15. Defendant made no payment thereon. *Id.* However, the fact that Plaintiff submitted the bills to Defendant for payment evidences his intent to have continued using his Fortis policy.

The embarrassment Plaintiff testified about suffering from going to the free clinic rather than Dr. Shea's private office for his primary treatment occurred after the rescission, not before. Prior rescission, Plaintiff had only the one-time visit to qualify for financial help from Hope Health with drug co-pays. His next visit was not until January 8, 2003, four months after the rescission letter. *See* Plaintiff's Trial Exhibit 50a.

The next two defense arguments to be addressed are:

(f) Whether the net worth evidence should have been submitted to the jury or should have been merely considered by the Court post-verdict; and

(g) Whether the net worth evidence should have been limited to South Carolina earnings as opposed to nationwide earnings.

Defendant complains that evidence of its net worth may properly be considered only by the Court post-verdict, but should not be submitted to the jury. The Court disagrees. Absent knowledge of the Defendant's financial status, it would be impossible for the jury (a) to determine a corporate defendant's ability to pay; or (b) to fashion an appropriate amount of punitive damages reasonably calculated to punish and deter. Our appellate courts have expressly approved testimony by Dr. Wood presented to jurors about the financial condition of corporations that is quite similar to that presented in this case. See, e.g. *Cock-N-Bull Steakhouse, Inc.*, 321 S.C. 1, 466 S.E.2d 727 (1 996); *Orangeburg Sausage v. Cincinnati Ins. Co.* 316 S.C. 331, 450 S.E.2d 66 (Ct.

App. 1995) In fact, the testimony of Dr. Wood approved by our Supreme Court in *Cock-N-Bull* went much farther than his more restrained testimony in this case.

The Court is not aware of any U.S. Supreme Court case which holds that jurors should not hear testimony of a defendant's net worth. Defendant cites no authority in its Motion to support that argument. U.S. Supreme Court precedent supports the admission of such evidence. *See, e.g., Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045. Under South Carolina law the defendant's ability to pay is an important factor to use in determining whether a punitive damages award is reasonable. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350 (1991).

Defendant also contends that evidence of its net worth should have been limited to South Carolina earnings as opposed to nationwide earnings. The Court disagrees, and notes that Fortis has not cited any authority to support that proposition either. The U.S. Supreme Court in *State Farm v. Campbell, supra*, cautioned that a particular state does not have a legitimate interest in punishing a corporation for conduct outside the territorial limits of that state, but that holding does not in any way preclude the admission of net worth evidence. Evidence of a corporation's total net worth is probative of that corporation's ability to pay an award of punitive damages, and the amount of punitive damages needed to effectively punish and deter its wrongful practices.

The Court questions whether earnings in a particular state of a multi-state or multi-national

corporation can even be determined in accordance with traditional accounting principles, but if it can, that figure would have no probative value. If earnings by a multi-state or multi-national corporation are allocated to a particular state for trial purposes, the resulting figures would most likely be disproportionately low compared to a party's true earnings, net worth and ability to pay. Projecting ability to pay from such limited information would thus likely lead to punitive awards that are not rationally calculated to punish and deter.

Moreover, there are practical problems with shifting the focus from actual net worth or net earnings to individual state allocations of net worth or net earnings. That would invite use of unorthodox accounting methods and/or potential manipulation of financial data by a defendant, which would subvert rather than serve the interests of determining a proper punitive damages award.

In this case, Defendant did not proffer any evidence at trial of its earnings or net worth attributable to its activities in South Carolina. However, Defendant belatedly attempted to enter an affidavit of Brian N. Rees as an attachment to its post-trial motions. I declined to consider the affidavit. Mr. Rees was not named as a witness, so Plaintiff had no opportunity to depose or cross-examine him. Defendant failed to offer the contents of the affidavit for jury consideration. Moreover, the affidavit did not present any helpful information. Even though Defendant presented the affidavit in support of its argument that the evidence of Defendant's ability to pay punitive damages should have been limited to South Carolina earnings, the

affidavit of Mr. Rees focuses on an entirely different concept, that of estimated "underwriting profits (before taxes) and/or losses for 2003-2005." The affidavit does offer any definition of "underwriting profits" or any explanations for how estimates were made for "underwriting profits (before taxes) and/or losses" for such years. Mr. Rees' affidavit substantiates the Court's concerns about encountering unorthodox accounting methods and/or potential manipulation of financial data if courts were to try to allocate net worth or earnings to an individual state, when the party's business is multi-state or multi-national.

The trial testimony of Dr. Wood regarding Fortis' financial status was not controverted in any way by Fortis at trial. The Court finds that Dr. Wood's testimony proves Fortis has the ability to pay the punitive damages verdict in this case, and concludes that evidence of its ability to pay was properly introduced for jury consideration. That evidence was necessary for the jury to determine the size of a punitive damages award needed to punish and deter Defendant's misconduct.

6. Defendant reiterates its prior arguments on any other issues covered in the post- trial motions. It is difficult to understand the substance of this ground, since it appears to be a "catch-all" category of unspecified prior arguments. However, the Court stands by its prior decisions on all issues for reasons previously set forth.

NOW THEREFORE, IT IS SO ORDERED, ADJUDGED AND DECREED, that the Defendant's Motion *to* Alter or Amend the Judgment under Rule 59(e) shall be, and the same is hereby DENIED.

AND IT IS SO ORDERED, this 25th day January of 2007.

/s/The Honorable Michael G. Nettles
Presiding Judge
Twelfth Judicial Circuit

Supreme Court, U.S.
FILED
MAR - 2 2010
OFFICE OF THE CLERK

No. 09-854

In the Supreme Court of the United States

FORTIS INSURANCE COMPANY,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

In an effort to persuade the Court that the end result—a $10,000,000 punitive award in a case in which the actual damages were $150,000—is justified regardless of the procedural and substantive errors committed in reaching it, respondent accuses us of "misstat[ing] key facts and omit[ting] others." Opp. 7. But the parties' differences as to the facts have no bearing on the first question presented, and only minor relevance to the second.

In any event, those differences are less material than respondent suggests. Most significantly, respondent points to no evidence that Fortis ***knew*** that the key medical record was misdated, instead contending that Fortis "had ample means to confirm the correct date but chose not to undertake that task." Opp. 8. But we already have acknowledged that, with the benefit of hindsight, Fortis's failure to verify the accuracy of the medical record "'merits no praise.'" Pet. 23-24 (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003)). That perfectly typical aspect of all punitive damages cases hardly means that this case is "a poor vehicle for review of any conflicts that might exist over review of punitive damage awards," as respondent insists (Opp. 13).

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[1] The Rule 29.6 Statement in the Petition remains accurate.

ARGUMENT

I. The South Carolina Supreme Court's Use Of Potential Harm Warrants Review And Reversal.

A. Fortis lacked notice that the $1,081,189 figure would be employed to justify the amount of punitive damages.

Respondent does not deny that (i) he expressly told the jury that the purpose of the $1,081,189 figure was to show Fortis's motive; (ii) the court instructed the jury that the punitive damages must bear a reasonable relationship to the ***actual harm***; (iii) he argued that the punitive damages should be a percentage of Fortis's wealth; and (iv) the jury's punitive award was exactly 100 times the compensatory award and within rounding distance of one of the wealth-based measures he had proposed. Respondent nevertheless contends that Fortis had fair notice that the $1,081,189 figure could be the basis for setting the punitive damages. He can do so only by distorting the record.

First, he notes that the $1,081,189 figure was admitted to show Fortis's motive to rescind his policy. Opp. 15 (citing Pet. App. 63a-64a). But the very page of the trial court's ruling he cites confirms that the evidence was not admitted or used at trial to show "potential harm." See Pet. App. 64a ("Plaintiff did not argue that Fortis would have had to pay the entire [$1,081,189] under the policy. To the contrary, Plaintiff acknowledged that there were substantial co-payment obligations.").

Second, respondent's reliance on the admission of Dr. Htay's testimony (Opp. 15-16) is even more misguided. Dr. Htay testified that, if left untreated,

respondent's HIV would result in his death. The wrongful-death theory of "potential harm" was not invoked by the South Carolina Supreme Court and is therefore irrelevant to our contention that Fortis lacked fair notice that the $1,081,189 figure would be used to support the punitive award.

Third, respondent asserts that because Fortis did not seek a limiting instruction, it "simply has no basis to say that the jury's award for punitive damages was not partially predicated on" the $1,081,189 figure. Opp. 17. But no such instruction was necessary given his own closing argument and the instruction that the court did give, which expressly informed the jury that the punitive damages had to be reasonably related to the ***actual harm***.

Fourth, respondent mischaracterizes his closing, asserting that he "specifically argued that punitive damages were available to take away Fortis's incentive to avoid paying $1.004 million in medical management costs, potential harms that Mitchell faced." Opp. 17. What he actually said was that when "deciding whether Fortis acted willfully in reckless disregard, one of the things that you can also consider ... is whether Fortis had a financial incentive." R1532.

Fifth, respondent argues that the trial court "specifically considered various potential harms in evaluating whether the jury's verdict was excessive." Opp. 17. Of course, what the trial court did post-trial is irrelevant to our argument that, ***at the time of trial***, Fortis lacked notice that the $1,081,189 figure would be dubbed "potential harm" and used as the denominator of the punitive damages/harm ratio. In any event, the trial court did not treat the $1,081,189 figure as potential harm. Instead, it relied on the

policy's $6,000,000 lifetime cap (see Pet. App. 48a-49a)—a measure rejected by the South Carolina Supreme Court as unduly speculative.

B. The issue presented was fully preserved.

Respondent's contention that the procedural due process issue presented here was neither pressed nor passed upon in the South Carolina Supreme Court (Opp. 18-21) is misguided. Fortis had no inkling that the $1,081,189 figure would be used to support the amount of punitive damages until it received the South Carolina Supreme Court's decision.[2] Accordingly, in challenging the trial court's order upholding the punitive damages, it had no reason to argue that reliance on the $1,081,189 figure would violate due process. After receiving the decision, Fortis did raise the due process argument in its rehearing petition (Rehearing Petition 25-27; Reply 9-12), thereby preserving it for this Court's review. See *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.3 (1996).

Respondent suggests that Fortis could have raised a procedural due process challenge to the trial court's reliance on the $6,000,000 lifetime cap. Opp. 19-20. But the problem with the $6,000,000 figure was that it was absurdly speculative as a measure of potential harm, and Fortis attacked it on that basis. There was no dispute, however, that it was the accurate life-time cap. By contrast, the $1,081,189 figure is a demonstrably invalid measure of the future insurance benefits that would have been due respondent had the policy not been reinstated. But because

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[2] In his appellate brief (at 36), respondent invoked two—and only two—measures of potential harm: "Six million dollar lifetime medical benefits; Three million dollars for the [wrongful] death of a twelve year old."

respondent never suggested that this figure represented potential harm, Fortis had no reason to refute it. If the trial court had nonetheless relied on that figure to support the amount of punitive damages, Fortis would have raised a procedural due process objection in the South Carolina Supreme Court. Because the trial court did not do so, Fortis instead sensibly focused its fire on the trial court's reliance on the $6,000,000 figure.

C. The issue is a recurring one that has divided the lower courts.

Respondent contends that "the lower courts are neither conflicted nor confused about when potential-harm evidence may be considered on appeal in the course of excessiveness review." Opp. 24. In so framing the point, he ignores that there is confusion in ***this*** Court. As we discussed in the petition (at 12-13), in *TXO* a three-Justice plurality invoked potential harm to justify the $10,000,000 punitive award, while Justice Kennedy in a concurring opinion and Justice O'Connor in a dissenting opinion for herself and two other Justices rejected the plurality's reliance on potential harm as a post hoc rationalization. Since then, Justice Breyer has cited Justice Kennedy's concurrence for the proposition that "courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, not those that might have been given on the basis of some conceivable set of facts." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 593-594 (1996) (Breyer, J., concurring) (citation omitted). The division in this Court on an issue that so frequently recurs is reason enough to grant certiorari.

In any event, respondent's suggestion that the lower courts are not in disarray is mistaken.

First, respondent misunderstands *Security Title Agency, Inc.* v. *Pope*, 200 P.3d 977 (Ariz. Ct. App. 2008). The *Pope* court refused to consider the potential harm to the plaintiff had defendants' plan succeeded in its entirety because "[n]o evidence was presented" of that amount. *Id.* at 1000. The figure the jury rejected was a measure of ***actual*** harm. See *id.* at 993. In opposing that measure of actual harm at trial, the defendants had no reason to think that the plaintiff would argue post-verdict that it also was a measure of potential harm. Accordingly, the decision conflicts with that of the South Carolina Supreme Court.

Respondent also misunderstands *Goddard* v. *Farmers Insurance Co.*, 179 P.3d 645 (Or. 2008). True, the jury in the underlying case did not award the plaintiff the full amount of compensatory damages she requested, but the Oregon Supreme Court's rationale for refusing to treat that amount as "potential harm" was broader. It held squarely that "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury." *Id.* at 666. The South Carolina Supreme Court's belief that it could support a punitive award on the basis of a potential-harm theory not presented to the jury is irreconcilable with that holding.

Respondent is equally mistaken about the three cases on the other side of the divide: *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir. 2001); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001); and *Bennett* v. *Reynolds*, 242 S.W.3d 866 (Tex. Ct. App. 2007).

In *Tronzo*, the Federal Circuit did not merely find the excessiveness objection waived; rather, in deciding not to exercise its discretion to consider the waived argument, the court reasoned that "competent evidence of damages may have existed, but was never introduced" and that the potential harm therefore "may have been much higher than what was actually awarded" by the jury. 236 F.3d at 1350. That rationale squarely conflicts with *Pope* and *Goddard*.

Respondent asserts that it is not clear from the opinion in *New Orleans Train Car* that "the [potential-harm] rationale itself, or evidence of potential harm, was never presented to, or considered by, the jury." Opp. 23. Be that as it may, the court's holding that *TXO* authorizes courts to justify disproportionate punitive awards on the basis of measures of potential harm not found by the jury (795 So. 2d at 384) is broad and conflicts with *Pope* and *Goddard*.

Finally, respondent does not dispute that in *Bennett* the court scoured the record in search of "a baseline of potential harm" that "the jury did not find." 242 S.W.3d at 905 & n.46. Instead, he points out that the *Bennett* court selected as its measure of potential harm the defendant's assertion that ***his*** mental distress was $500,000. That kind of post-hoc reliance on evidence introduced for an entirely different purpose is precisely what happened here and precisely what *Pope* and *Goddard* reject.

II. The South Carolina Supreme Court's Application Of The *BMW* Guideposts Warrants Review And Reversal.

Respondent misunderstands our point entirely. We are not asking this Court to grant review so that it can "jettison its current framework" (Opp. 27).

Our point instead is that many lower courts—including the court below—have misapplied the "current framework," thereby sapping its "constraining power to protect against serious and capricious deprivations" of property (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)). What is needed is not a "jettison[ing]" of the framework, but clearer guidance as to how the framework should be applied.

Respondent cannot deny that the $10,000,000 exaction approved by the South Carolina Supreme Court is higher than the amounts deemed to be the constitutional maximum in cases involving materially more egregious conduct (see Pet. 25 n.13) and is $8,500,000 more than the highest punitive award ever permitted in an insurance bad-faith case in South Carolina (see Pet. 25). He also does not deny that the punitive award exceeds by $9,970,000 the maximum fine for violations of South Carolina's unfair claims handling statute. He says that the exaction is defensible because it "properly accomplishes the State's legitimate interest in punishment and deterrence" (Opp. 30; see also Opp. 25, 27). But that is precisely the kind of untethered rationale that this Court has consistently rejected. See, *e.g.*, *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

This case thus well illustrates that if the objectives of eliminating the "stark unpredictability" of punitive awards (*Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2625 (2008)) and ensuring "the uniform general treatment of similarly situated persons that is the essence of law itself" (*BMW*, 517 U.S. at 587

(Breyer, J., concurring)) are to be achieved, further guidance on the proper application of the guideposts is needed.

A. Reprehensibility

Respondent suggests that we are asking the Court "to reconsider reprehensibility's status as the most important indicium of reasonableness." Opp. 27 (internal quotation marks omitted). He is mistaken. Our beef is not with this guidepost's importance, but with the way that the South Carolina Supreme Court and other courts have applied it. It is perfectly fine to inquire whether a defendant's conduct entails the various indicia of reprehensibility identified in *State Farm*.[3] But it is not sufficient to end the inquiry there. Even if a defendant's conduct involved most of *State Farm*'s reprehensibility factors, the ultimate inquiry remains whether "the extraordinary size of the [punitive award] is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards." *BMW*, 517 U.S. at 595 (Breyer, J., concurring). And that inquiry cannot be conducted in a vacuum, but instead must take into account the magnitude of punishments permitted in cases involving both similar and more egregious conduct.[4]

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[3] Notably, respondent does not deny that there is a raging split over the meaning of the "repeated misconduct" factor. See Pet. 23 n.12.

[4] Respondent equates this inquiry with "a race to the bottom" in which the fact that "everyone else is doing it" is a justification for concluding that the conduct is not reprehensible. Opp. 28. Although we ***do*** believe that compliance with industry custom is a mitigating factor, our point here is that the defendant's conduct must be compared with the conduct in other cases to

Respondent asserts that this comparison is already undertaken as part of "the independent comparability guidepost," by which he means the third guidepost. Opp. 27. That may be so under the South Carolina Supreme Court's mistaken understanding of that guidepost, in which the focus is on the disparity between the punitive exaction at issue and punitive awards in prior cases. But the proper focus of the third guidepost is on ***legislatively established penalties*** for comparable conduct. See *BMW*, 517 U.S. at 583 ("a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue") (internal quotation marks omitted); *State Farm*, 538 U.S. at 428 ("The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for [violations of Utah's unfair claims handling practices act]."). In any event, the South Carolina Supreme Court never sought to explain why Fortis's conduct was so extraordinarily wrongful as to warrant a punishment 6.67 times the highest prior bad-faith punitive award.

Respondent also contends that comparing the conduct at issue with that in other cases would "requir[e] mini-trials in which juries hear evidence concerning the conduct of others." Opp. 28. Not so. Just as with the third guidepost's inquiry into fines for comparable conduct, this part of the reprehensibility inquiry can and should be performed by reviewing courts, not juries.

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ensure that the punishments for like acts are reasonably consistent.

B. Ratio

Respondent points out that this Court repeatedly has said that no single ratio marks the constitutional line in every case and asserts that accordingly "no conflict can exist simply by virtue of different outcomes." Opp. 29-30. But he cannot deny that numerous courts have interpreted *State Farm* as creating a presumption in favor of a 1:1 ratio when the denominator of the ratio is "substantial"—even in cases of highly reprehensible conduct—while numerous other courts have construed *State Farm* as immunizing any ratio that is less than double digits.

Contrary to respondent's assertion, we are not arguing "in favor of a mechanical application of a 1:1 ratio without consideration of this Court's teachings that some wrongs are more blameworthy than others." Opp. 26 n.6. If the denominator in this case were limited to respondent's $150,000 in actual damages, a ratio of 4:1 might well mark the constitutional line. See *State Farm*, 538 U.S. at 425. But given the enormous size of the denominator selected by the court below, deviating from the 1:1 line based simply on the assertion that the conduct is bad enough to warrant it (Pet. App. 24a) directly implicates this Court's concerns about "[punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution" (*Exxon Shipping*, 128 S. Ct. at 2633).

C. Legislatively established penalties for comparable conduct

Respondent dismisses the confusion in the lower courts regarding the third guidepost by caricaturing our position. We do not contend that punitive awards "must be remitted in each and every case

based on comparable civil or criminal penalties." Opp. 30-31. Our point is that the South Carolina Supreme Court—along with several other courts—has misapplied that guidepost by flatly refusing to consider the legislatively established penalties for the conduct at issue on the ground that they are too low. See Pet. 30-31.

Because it is not our position that legislatively established fines serve as the constitutional limit on punitive damages, respondent is mistaken in asserting that comparing the punitive damages to such fines "would render consideration of the first two guideposts a futile exercise in many, if not most, cases" (Opp. 31). By contrast, the South Carolina Supreme Court's approach would eliminate the third guidepost from consideration whenever it would actually point to a finding of excessiveness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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